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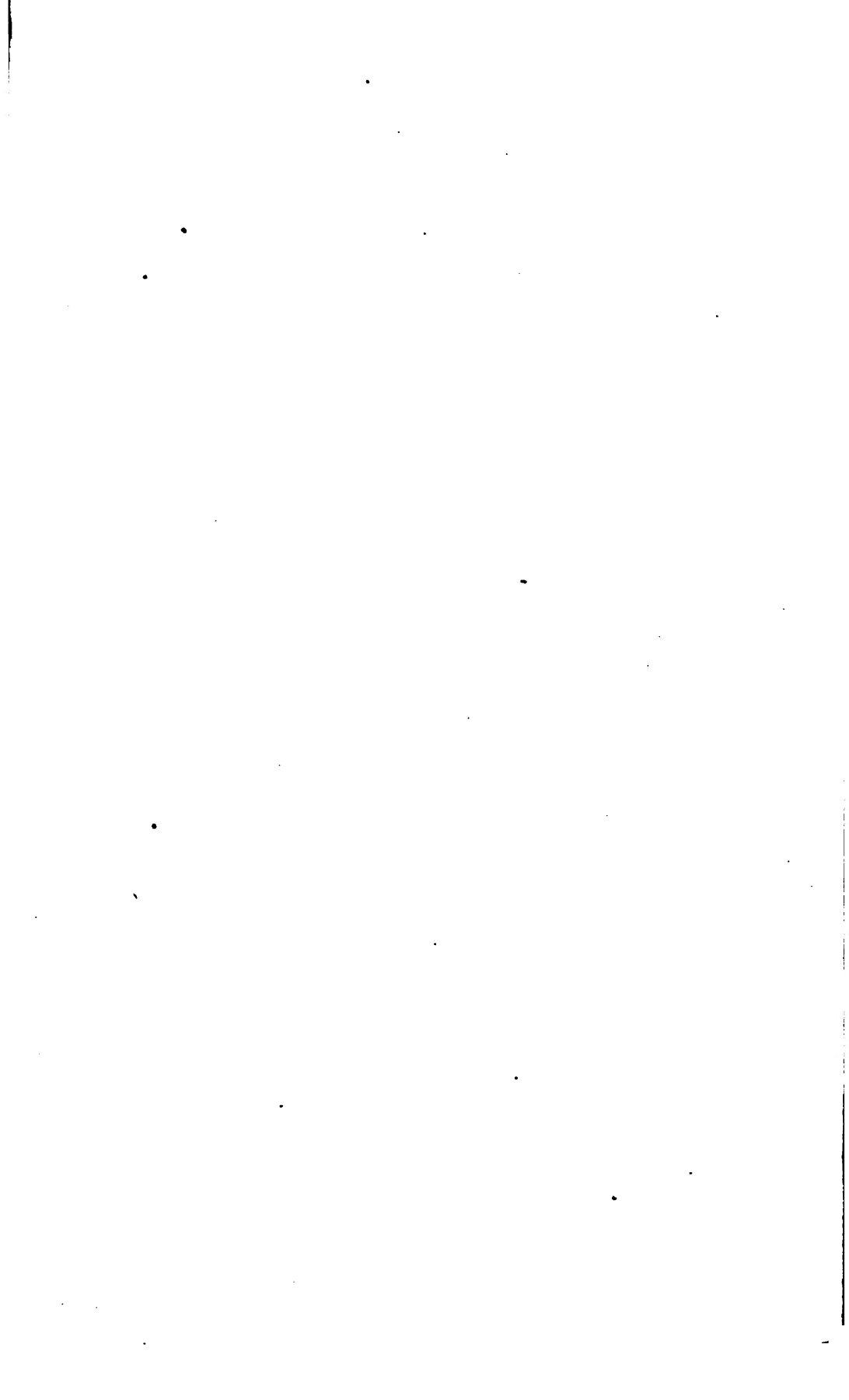
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THE
RIGHTS AND LIABILITIES
OF
HUSBAND AND WIFE.

THE
RIGHTS AND LIABILITIES
OF
HUSBAND AND WIFE

BY
JOHN FRASER MACQUEEN, ESQ., Q.C.,
Author of "The Appellate Jurisdiction of the House of Lords and Privy Council,"
"The Practice on Parliamentary Divorces," and other Works.

The Third Edition

BY
JAMES CHOLMELEY RUSSELL,
OF LINCOLN'S INN, BARRISTER-AT-LAW,
AND
ROBERT BRUCE RUSSELL,
OF THE MIDLAND CIRCUIT AND THE INNER TEMPLE, BARRISTER-AT-LAW.

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Dedication to the First Edition.

TO

THE RIGHT HONOURABLE

JOHN, LORD CAMPBELL,

&c. &c. &c.

MY LORD,

It is not your eminence as a great lawyer, nor your distinction as a leading member of our highest Legislative Assembly, that moves me to dedicate the following Treatise to your Lordship:—I inscribe it to the Author of the “Lives of the Chancellors.”

I have the honour to be,

MY LORD,

Your Lordship's very faithful and obliged Servant,

JOHN FRASER MACQUEEN.

Preface to the Third Edition.

IN the preparation of this Edition, we have endeavoured to adhere as far as possible to the plan of the original Work; but alterations so many and so extensive have been introduced by recent legislation into the law of Husband and Wife, that it was not found possible to retain unaltered any very considerable portion of the actual text.

The Married Women's Property Act, 1882, has effected a fundamental change in the *status* or personal capacity of all married women, whatever may have been the date of the marriage; but there is a marked distinction, as to rights of property, between women who have been married since the 1st January, 1883 (the date fixed for the commencement of the Act), and those who were already married at that date. For, while none of the property of the latter which had been acquired before the Act was affected by its provisions, the quality of "separate property" has been impressed by the Act upon all the real and personal property of women subsequently married. Thus, for some time to come, the old law will continue to operate, though in a gradually diminishing number of cases, upon the property of certain married women; and it is, therefore, as yet impossible, in a Treatise on the Law of Husband and Wife, to exclude the consideration of subjects which will eventually become obsolete.

With the exception of the historical disquisitions on the *Marriage Contract* and the ancient Law of Divorce, the work has been almost entirely re-written, and while we have not, for the reasons given above, wholly rejected any Chapters of the previous Editions, we have in some cases considerably curtailed the pages

occupied by a discussion of subjects, the importance of which is year by year diminishing. We have endeavoured to state the new as well as the old law upon each branch of the subject; and all the cases which throw light upon the construction of the Act of 1882 are, it is believed, referred to in the text.

The Law of Divorce, as administered by a civil tribunal, owes its origin to a Statute passed since the publication of the First Edition of this Work, and was in the next Edition treated at no great length; we have considered it expedient to include in the present Edition a fuller discussion of that subject than was possible when the Court had been established for a comparatively short period.

In addition to a Chapter upon the Custody, Education and Maintenance of Children, we have introduced a new Chapter upon Recent Legislation, in which the various changes effected by the late Act receive detailed consideration. Some of the difficulties which arise in its interpretation are there suggested.

In the Table of Cases references have been given where practicable, not only to the Law Reports, but also to the Law Journal, the Law Times, and the Weekly Reporter.

In the discussion of so important and difficult a subject as the Law of Husband and Wife, it may well be that some points have been overlooked, and that some incorrect inferences have been drawn, but it is hoped that these are few, and that the Work as it now stands will be found to be a not incomplete exposition of the Law of Husband and Wife.

J. C. R.

R. B. R.

November, 1884.

NOTE.—I desire to acknowledge my obligation and to render my sincere thanks to my friend Mr. A. ST. JOHN CLERKE, of Lincoln's Inn, for his most valuable assistance and co-operation, in the preparation of that portion of the work which I undertook, and also in the labour of the revision of the sheets for the press.

J. C. R.

Author's Preface to the First Edition.

I HAVE endeavoured to make this work useful, clear and short.

The subject is distributed according to the order of time; and the simpler cases are made to introduce those which are more complex.

My plan is to treat first of GENERAL RULES and then of SPECIAL STIPULATIONS.

Questions of Conveyancing I touch upon but lightly, because these are more ably dealt with by writers whose books are necessarily in every hand.

For a similar reason I am silent, or nearly so, as to pleading.

Keeping, however, within the limits of a strict adherence to my subject, the relation of husband and wife is one peculiarly fertile in legal difficulties, and certainly not barren of judicial conflict. Merely to collect the cases would have been easy. But I have not always thought myself at liberty to give decisions without commentary.*

To Mr. Bethell, Q.C., for valuable advice and important suggestions my sincere thanks are due.

The continued revision of Mr. Russell, Q.C., confers an obligation upon my readers, as well as upon myself; and furnishes another proof of the fact that those who have most to do contrive often to have the most leisure.

* The remarks of a legal writer may be of use in practice. He has his mind full of the subject. All the authorities have been reviewed by him. He finds a case which, in the language of the Courts, "stands alone." By a word or two he may prevent it from misleading. He puts readers on their inquiry, and by inducing an exercise of thought fixes legal principles in the reason as well as in the memory.

In the Appendix No. I.,* there is a practical Summary of Proceedings on "Alienations by Married Women," which I hope will prove useful (particularly to solicitors), not only in England, but in Scotland and Ireland, as well as abroad; wherever, in short, married women having English deeds to execute may happen to reside. It is the first effort yet made to methodise and elucidate the system established under the Fines and Recoveries Act, and the rules of the Court of Common Pleas, passed in pursuance thereof. To say nothing of the pains bestowed on it by myself, this Summary has had the benefit of a careful revision by Mr. Millard, of the Acknowledgments Office, who has contributed the forms and other materials now, for the first time, made public. Those who know from experience the many misapprehensions which the new enactments occasion, will be the readiest to commend the good service done by Mr. Millard, to whom I have pleasure in expressing my obligation.

Since the period when Mr. Roper wrote, the law which forms the subject of his prolix though learned Treatise has been greatly matured; and even the Notes of his profound and accomplished Editor have lost much of their value.† Many points of high importance, formerly questioned, are now settled; and doubts have been cleared away by decisions, which give us certainties instead of speculations.

A new work was therefore wanted. How far the present may satisfy the demand of the profession, the profession itself must decide.

J. F. M.

9, OLD SQUARE, LINCOLN'S INN,
March 19th, 1849.

* In consequence of legislative changes, this Summary has been omitted from the present Edition as no longer applicable to existing circumstances.—EDS.

† For example, Mr. Jacob's elaborate Commentary of forty-six close pages on the "Solemnization of Matrimony," is entirely superseded by the Judgment of the House of Lords in the Presbyterian Marriages' Case, *Queen v. Mills*, 10 Cl. & Fin. 534; *infra*, pp. 3 and 6, n. This, however, with some of his other Notes, must always continue to be curious and interesting, as showing his research, penetration and singular sagacity; but after all, he only doubtfully anticipates that which has been since fixed and concluded by judicial authority. Such of his Notes as retain their utility I have availed myself of, with the proper acknowledgments.

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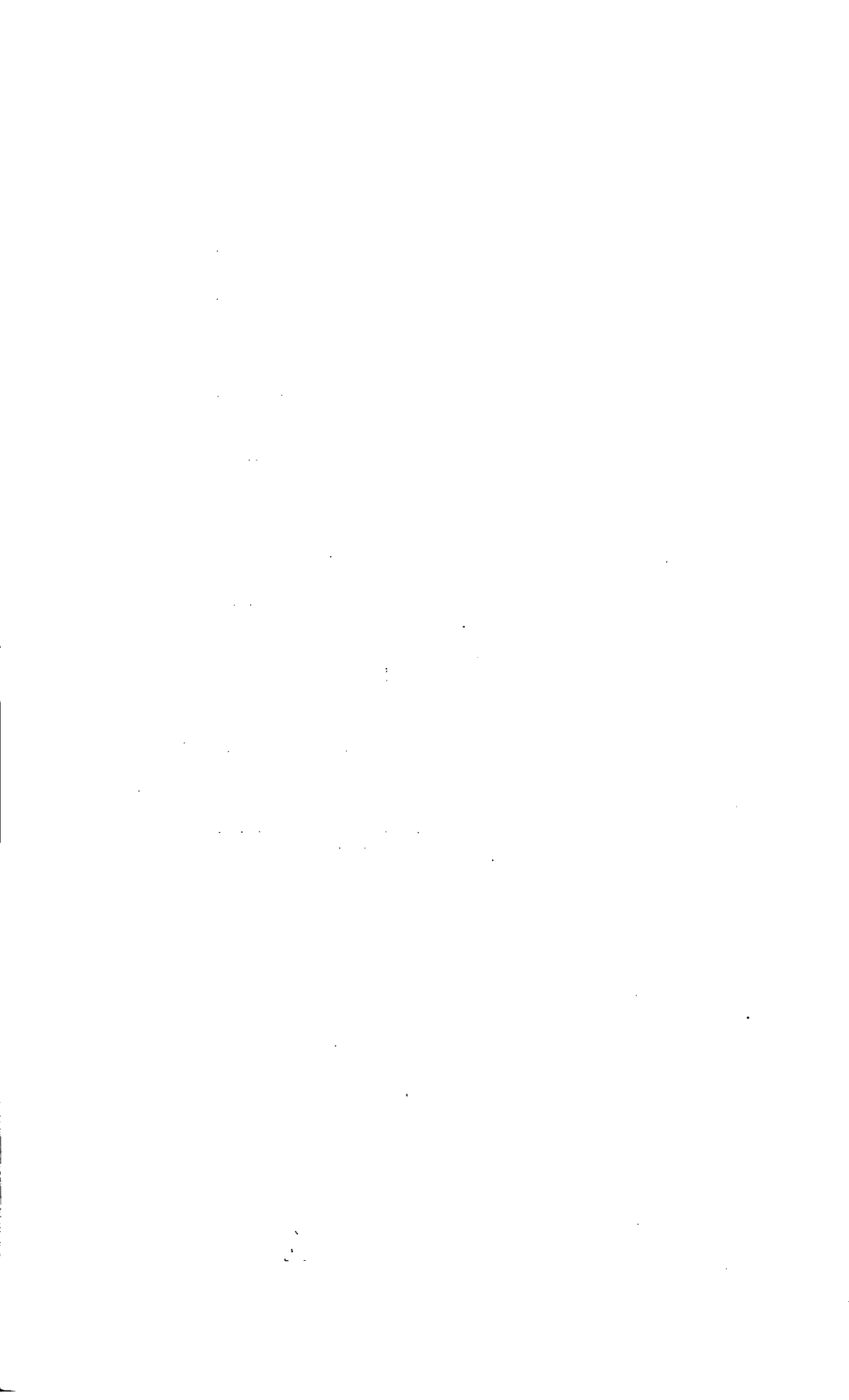


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ADDENDA ET CORRIGENDA.

- Page 21. In Contents to Section II. § 7, for "survives" read "survived."
- „ 25. In Contents to Section III. § 4, for "would" read "could."
- „ 107. Line 20, for "22" read "122."
- „ 177. Note (g), add, "*Clifford v. Clifford*, 9 P. D. 77. Capital as well as income can be dealt with, *Ponsonby v. Ponsonby*, 9 P. D. 122."
- „ 189. Note (b), The Bill referred to was passed, and is the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68); so that a decree for the restitution of conjugal rights can no longer be enforced by attachment. The Act is set out in full in the Appendix. It contains also provisions as to orders for periodical payments to be made to the wife, and for the wife's property or earnings to be settled for the benefit of the husband and children, and as to the custody, maintenance, and education of children; and also enacts that non-compliance with a decree for restitution of conjugal rights is desertion without reasonable cause.
- „ 191. Note (i), add, "As to the payments by either party in cases of applications for restitution of conjugal rights, see the Matrimonial Causes Act, 1884, in the Appendix."
- „ 194. At foot add, "Alimony is not assignable, *Re Robinson*, 27 Ch. D. 160."
- „ „ Note (b), See, however, *contra*, *Bailey v. Bailey*, (C. A.) 53 L. J., Q. B.
- „ 241. Line 10 from foot, *dele* "or judicial separation."
- „ 264. In Contents to Section III. § 25, for "1882," read "1883."
- „ 276. Note (y), *Swift v. Pannell*. Since reported 24 Ch. D. 210.
- „ 298. Last line, for "18th" read "10th."
- „ 314. Note (f), *Re Bown*. Since reported 53 L. J., Ch. 881.
- „ 366. Note (n), As to custody, maintenance, and education of children in cases of applications for restitution of conjugal rights, see the Matrimonial Causes Act, 1884, in the Appendix.
- „ 394. Note (p), *Weldon v. Winslow*. Since reported 53 L. J., Q. B. 528.
- „ 408 and 410. Notes (e) and (h), *Baynton v. Collins*. Since reported 33 W. R. 41.
- „ 433. Note to sect. 1 (1), *Mander v. Harris*, on appeal. Since reported 27 Ch. D. 166.

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THE Contract of Marriage, by which man and woman are con-joined in the strictest society of life till death or divorce shall separate them, is the most ancient, the most important, and the most interesting of the domestic relations. Though correctly designated a civil contract, it differs in sundry points from all other civil contracts; and chiefly in this, that it is indissoluble at the will of the parties. For which reason, and because of certain mysterious expressions of high import respecting it in the sacred writings, it is also deemed a *divine* contract; having been so constituted by the circumstances of its original institution in the case of our first parents, and by the fact of its

Marriage a contract at once civil and divine.

subsequent elevation into the character of a symbol, or type, emblematical of the union of Christ with his Church. Hence, by Roman Catholics, marriage is considered a sacrament ; and even by many denominations of Protestants it is regarded as in some degree partaking of the sacramental nature, although they do not admit it to be actually a sacrament. And this it is which renders matrimony a holy estate, religious in its chief essential attributes, though temporal and arbitrary in its multiform methods of external celebration.

Anciently completed throughout the continent by the mere consent of parties.

By the earlier ecclesiastical law, down to the middle of the 16th century, marriage throughout the continent of Europe was looked upon as a *consensual* contract (*a*), capable of being completed by the parties without any interposition of spiritual authority. This appears from the Decretals, from Sanctius *De matrimoniis*, and more especially from De Burgh, who, (in a Treatise composed at the end of the 14th century,) expressly affirms that the priest's co-operation is unnecessary, as not being of the essence of the matrimonial sacrament, but merely recommended by the Church for the sake of greater decency and order. So that according to these venerable testimonies the sacrament of marriage might be mutually administered by the contracting parties to each other, without the aid of the sacerdotal office, or even the presence of any one clothed in holy orders.

Legitimation subsequent to *matrimonio*.

And here may shortly be mentioned a benevolent fiction of the Roman law, whereby children born bastards were held legitimate on the subsequent marriage of their parents—a rule which was adopted by the Canonists, and followed by every Christian nation, whether Popish or Protestant, England alone excepted. And yet there were not wanting strenuous efforts to import this doctrine hither. But it met with a memorable and final repulse from the Barons, assembled in Parliament at

(*a*) That is to say, a contract completed by a mere interchange of consent—by the *conjunctio animorum* ; so that although the parties, after consent given, should, by death, disagreement, or other cause

whatever, happen not to consummate the marriage *conjunctio corporum*, they were, nevertheless, entitled to all the rights, and subject to all the liabilities of the marriage state.

Merton, who, in answer to a proposition for its introduction, emphatically declared *nolumus leges Angliæ mutari* (b).

Thus, then, stood the general law of marriage, when, about three centuries ago, the famous Council of Trent, assembled by the Pope, made a decree, which, after admitting that clandestine marriages had previously been valid, proceeded to declare that, for the future, no marriage should be effectual unless celebrated duly *in facie ecclesiæ* (c). And this continues still to be the ecclesiastical law of Roman Catholic communities (d).

Trent decree requiring ecclesiastical celebration.

Upon the celebrated case of the Irish or Presbyterian marriages (e), the great question of debate in the House of Lords was, whether the ancient matrimonial law of England was the same as that which had obtained in the rest of Europe anterior to the decree of the Council of Trent. That decree, be it observed, had authority only in those countries which acknowledged the Papal supremacy. It had no reception in England, being dated nearly thirty years subsequent to the breach between Henry VIII. and the Pope. The matrimonial law of England, therefore, continued on its former footing. By that law

Ancient marriage law of England.

Trent decree not received in England;

(b) It was supposed that although the doctrine of Legitimation *per subsequens Matrimonium* was not received in England, yet if a person, born a bastard in a country where the doctrine obtained, was legitimated by the subsequent marriage of his parents, such person might inherit land in England on the principle that if one be legitimate where he is born, he should be taken to be legitimate all the world over. But in *Birtwhistle v. Vardill*, 7 Cla. & Fin. 895, it was decided by the House of Lords that a Scotchman, under such circumstances, although legitimate for all other purposes, was yet incapable of taking land in England by descent; the rule of the common law, as declared by the Statute of Merton, being that the heir at law is, not a man's eldest lawful son, but his

eldest son born in lawful wedlock. See Lord Brougham's Judgment at p. 955. See also *Re Goodman's Trusts*, 17 Ch. D. 266.

(c) "The law of the Council of Trent is, that a marriage, to be valid, must be in the presence of the parish priest and two witnesses."—*Evidence of Dr. Wiseman in the Sussex Peerage Case*, 11 Cla. & Fin. 764.

(d) But supposing a marriage of two Protestants, celebrated in a Roman Catholic country, according to their own ritual, it would be considered valid, although not in accordance with the *lex loci*.—*Evidence of Dr. Wiseman in the Sussex Peerage Case*, 11 Cla. & Fin. 764.

(e) *The Queen v. Millis*, 10 Cla. & Fin. 534; *Catherwood v. Caslon*, 13 Mee. & Wel. 261.

where, however, marriages by mere consent were only effectual for certain purposes.

What were anciently the effects of private marriages in England.

clandestine marriages were allowed. But they were not attended with the same effects as marriages solemnized *in facie ecclesie*. And herein lies the peculiarity of the old English law, when viewed in contradistinction to the ancient continental law. By the continental law, prior to the Council of Trent, a private marriage was as good as a public one. By the law of England, until altered by the statutes to which we are about to advert, a private marriage, that is to say, a marriage not solemnized *in facie ecclesie*, was good only for certain purposes (*f*). Thus, a private or clandestine marriage, or, as it was sometimes called, a verbal contract (which might either be by words of present consent, or by words of promise, followed by cohabitation,) was, in the first place, not sufficient to give the woman the right of a widow in respect to dower; nor, secondly, to give the man the right of a husband in respect of the woman's property; nor, thirdly, to render the issue begotten legitimate: nor, fourthly, to impose upon the woman the disabilities of coverture; nor, fifthly and lastly, to make the marriage of either of the parties (living the other) with a third person void (*g*); all these consequences being confined exclusively to marriages solemnized *in facie ecclesie*.

Nevertheless, the effects of clandestine marriages were very remarkable, though falling greatly short of those which attached upon regular matrimony. For it is now agreed, and has indeed been decided by the House of Lords, that at common law, a contract entered into between man and woman by words of present consent was indissoluble. The parties could not release each other from the obligation. Either party, too, might by a suit in the spiritual court compel the other to solemnize the marriage *in facie ecclesie*. It was so much a marriage, that if they cohabited together before solemnization, they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract, moreover, was considered to be of the very essence of matrimony, and was, therefore, and by reason of its indissoluble nature,

(*f*) Bla. Com. Book i. c. 15, p. 439.

(*g*) It did make it voidable. See the next paragraph in the text.

styled in the ecclesiastical law *verum matrimonium* and sometimes *ipsum matrimonium*. Another, and a most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnizing such marriage *in facie ecclesiæ*, the same might be set aside even after cohabitation and after the birth of children (*h*): and the parties might be compelled to solemnize the first marriage *in facie ecclesiæ*.

So a contract of marriage *per verba de futuro*, followed by cohabitation, produced precisely the same consequences as a contract *per verba de præsentî*. For where a copula ensued upon the promise, the present consent essential to matrimony was supposed to be at that moment exchanged between the parties; a legal presumption which, though but slightly founded in nature or reality, was held to be abundantly recommended by its equity and the just check which it imposed upon perfidy.

The ancient law of England, therefore, with respect to the constitution of marriage, was very peculiar, and no more to be understood by reference to the continental system, or even to the practice of the sister country of Scotland, than the law of real property or any other branch of our jurisprudence. And this, it is submitted, was the great point established in the case of the Irish marriages above referred to; which, though carried in the House of Lords with infinite difficulty, and in spite of many strong and, as some may think, insuperable arguments opposed to it, must henceforth be regarded as settled and concluded in all legal reasoning on the subject; the short general proposition derivable from the adjudication being, that by the ancient law of England a marriage by private contract was good only for certain purposes, and those not the most important ones; no marriage being absolutely perfect until celebrated *in facie ecclesiæ* by the intervention of a person in holy orders (*i*); that is to say, orders conferred by episcopal authority (*k*).

Ancient law of England as to the constitution of marriage very peculiar.

Priest always indispensable to perfect marriages.

(*h*) It was not however absolutely void. A proceeding to set it aside was necessary.

(*i*) In India, where the common law of England as to marriage has been introduced, the presence of a

minister is not essential. See *Maclean v. Cristall*, Perry's Oriental Cases, 75.

(*k*) The theory of Sir Wm. Scott's celebrated judgment in *Dalrymple v. Dalrymple*, 2 Hagg. Cons. Rep.

Evils of
clandestine
marriages.

Remedy
thereof by
Lord Hard-
wicke's Mar-
riage Act, 26
Geo. 2, c. 33.

Towards the middle of the last century, the "evil of clandestine marriages" was felt to be "one of the growing evils of the times, productive of many calamities in families, and of great mischief and disorder in the community" (l). Hence, in the year 1753, a statute (m) was passed at the instigation of Lord Chancellor Hardwicke, intituled "An Act for the better preventing of Clandestine Marriages;" which Act is considered by Blackstone to be "an innovation upon our ancient laws and constitution" (n), a sentence which there is but little doubt it deserves. For, adverting to "the great mischiefs and inconveniences"

54, does not, it must be owned, correspond throughout with the views above suggested. But it is to be remembered that the Irish Marriage case (*Queen v. Millis*, 10 Cl. & Fin. 534) underwent the most extensive and elaborate examination; and the decision is by the last resort assisted by the learned judges; so that it is vain and idle to talk of a comparison of opinions. See also *Catherwood v. Caslon*, 13 Mee. & Wel. 261, decided by the Court of Exchequer, following the House of Lords. Sir Wm. Scott, too, will be found, on a reperusal, to betray symptoms of hesitation and uncertainty when dealing with the ancient common law of marriage in this country.

(l) Per Lord Hardwicke, *Midleton v. Croft*, 2 Atk. 650.

(m) 26 Geo. 2, c. 33. It is said, that at the time when this Act was introduced, the attention of the legislature had been particularly drawn to the subject, by a case which came before the House of Lords in its judicial capacity. The case seems to have been that of *Campbell v. Cochrane*, an appeal from Scotland, noticed in the opinions given in *Dalrymple v. Dalrymple*, 2 Hagg. 129. That case

was decided by the House of Lords on the 31st of January, 1753, and on the same day it was ordered that the judges should prepare a bill for the better preventing clandestine marriages.—*Lords' Journals*, vol. 28, p. 14. But, although the example which this case furnished of the effects of the Scotch law of marriage was probably the immediate occasion of the measure, it was confined to England. Some alteration in the law of Scotland was however contemplated at the time. After the bill had been committed, it was ordered that the Lords of Session in Scotland should prepare a bill for the more effectually preventing clandestine marriages in that part of the kingdom.—*Lords' Journals*, vol. 28, p. 98. By 19 & 20 Vict. c. 96 (for amending the law of marriage in Scotland), "no irregular marriage contracted in Scotland by declaration, acknowledgment or ceremony shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage, any law, custom or usage to the contrary notwithstanding."

(n) 1 Com. c. 15, p. 438.

which have arisen from verbal contracts, the statute enacted that "in no case whatever should any suit or proceeding be had in any ecclesiastical court, to compel a celebration of any marriage *in facie ecclesiæ* by reason of any contract of matrimony whatsoever, whether *per verba de præsentibus* or *per verba de futuro*." From this date, therefore, verbal contracts were no longer, as before, indissoluble. Solemnization could not be enforced; and a subsequent marriage solemnized *in facie ecclesiæ* could not be avoided; but, on the contrary, would be valid and binding from the time of its celebration, and would be accompanied by all the civil consequences of a regular and perfect marriage.

The statute rendered it indispensable that all marriages should be celebrated in some parish church or public chapel. Liberty, however, was given to evade this obligation, by obtaining a special licence from the Archbishop of Canterbury; a dispensation too expensive to be frequently resorted to. The marriage must also have been preceded by publication of banns; but these might be got rid of by licence from the spiritual Judge. The statute further enacted that all marriages should be solemnized in the presence of two or more witnesses, besides the officiating minister; and an entry of the proceeding was to be made in a register appointed for the purpose, to be signed by the parties, the minister, and the witnesses. Many other formalities were prescribed by the Act; which, moreover, provided that, where either of the parties (not being a widow or widower) was under twenty-one, all marriages celebrated by licence without consent of guardians should be absolutely void (o).

Requisites
under Lord
Hardwicke's
Act.

(o) "Lord Hardwicke's Marriage Act, with considerable modifications and improvements, remains in force, and regulates in England the most important of all contracts upon which civil society itself depends."—*Lord Campbell's Lives of the Chancellors*, vol. 5, p. 124. The noble biographer states, that before the Act, "young heirs and heiresses, scarcely grown out of infancy, had

been inveigled into mercenary and disgraceful matches; and persons living together as husband and wife for many years, and become the parents of a numerous offspring, were pronounced to be in a state of concubinage; their children being bastardized because the father had formerly entangled himself in some promise which amounted to a pre-contract, and rendered his subse-

Its operation in England similar to that of the Trent decree on the continent.

But it often worked injustice. Hence the 4 Geo. 4, c. 76.

The effect of Lord Hardwicke's statute was to do away entirely with clandestine marriages in England; and, so far, its operation here was very much the same as that of the Trent decree upon the continent.

The provisions of this enactment (in many instances productive of great hardship and injustice) continued to be law till the year 1823, when, by the 4th Geo. 4, c. 76, the penalty of nullity was confined to the case of persons *wilfully consenting* (*p*) to the performance of marriage, before publication of banns, or before obtaining a licence, or by one not in holy orders, or elsewhere than in a church or licensed chapel. The want of consent, too, by guardians, in the case of minors, did not, by this act of Geo. 4, invalidate the marriage; but the minister officiating in such a case was made liable to banishment. And the 23rd section, to be more particularly adverted to hereafter (*q*), provided that, in the event of any fraud prac-

quent marriage a nullity. In the public prisons, particularly in the Fleet, there were degraded and profligate parsons ready, for a small fee, to marry all persons at all hours there; and to go, when sent for, to perform the ceremony in taverns or in brothels." After remarking that "the Act declared null all marriages that were not celebrated by a priest in orders," and that "in the case of minors the licence should be void, without the consent of parents or guardians," his lordship proceeds to point out as its prominent defects that "it required Roman Catholics, Dissenters, and others, to submit to it, or be debarred from matrimony altogether. Another great defect was, that no provision was made by it respecting the marriage out of England of persons domiciled in England, so as to prevent the easy evasion of it by a trip to Gretna Green. The measure was likewise highly objectionable in

making no provision for the marriage of illegitimate children, who had no parents recognized by law, and could only have guardians by an application to the Court of Chancery; and in declaring marriages, which were irregular by reason of unintentional mistakes in banns or licences, absolutely void, although the parties might have lived long together as man and wife, with a numerous issue considered legitimate, until the discovery of the irregularity."

(*p*) The marriage will not be held to be null and void unless both parties "knowingly and wilfully" concurred in the undue publication of the banns: *Gompertz v. Kenseit*, L. R., 13 Eq. 369; *Templeton v. Tyree*, L. R., 2 P. & M. 420; or were aware at the time of the ceremony of the absence of banns and licence: *Greaves v. Greaves*, L. R., 2 P. & M. 423.

(*q*) See *post*, p. 13.

tised to procure the contract, the party guilty thereof should forfeit all property accruing from the marriage (*r*).

The statute of Geo. 4 was certainly an improvement upon that of Geo. 2; but it was far from meeting with universal approbation; for, besides many other objections, it left the power of marrying as it stood before, exclusively in the hands of the Church; a restriction which gave offence to almost every denomination of Dissenters. The consequence was, that in the year 1836 the marriage law of this country underwent a still farther change; the 6 & 7 Will. 4, c. 85, commonly called Lord John Russell's Act, with the acts subsequently passed for its amendment (7 Will. 4, c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119; and 23 Vict. c. 18), placed it on its present footing and enabled parties desirous of entering into wedlock to complete their contract without any appeal to spiritual authority. Such persons, therefore, as object to marry *in facie ecclesiæ* may now repair to the registrar; and, upon giving the notices (*s*) and procuring the certificates as prescribed by the statutes, may be married, either before that officer by a verbal declaration; or, in the registered places appointed for the purpose, may solemnize their marriage according to any form or ceremony they please (*t*); taking care, however, whichever mode they resort to, that two witnesses be present, and that the proceeding be completed with open doors between eight and twelve in the forenoon (*u*); so as to afford, apparently, some security for order and publicity. Marriages thus completed are, in all respects, as binding and as effectual as if they were celebrated

Present law,
the 6 & 7
Will. 4, c. 85,
and the
amending
acts.

(*r*) But see 3 Geo. 4, c. 75, and 4 Geo. 4, c. 17, and Parliamentary Debates of 1822 and 1823. In the above sketch the complicated provisions of these Acts are not set out, because they were soon afterwards superseded, or nearly superseded, by the 4 Geo. 4, c. 76. See 2 Roper on Husband and Wife, 482; and see, also, *The King v. Inhabitants of Birmingham*, 8 Barn. & Cress. 29, 35, and 5 Bac. Abr. 288.

(*s*) The "due notice" required by these Acts is a notice conforming

to the formalities provided by 6 & 7 Will. 4, c. 85: *Holmes v. Simmons*, L. R., 1 P. & M. 523. There is no analogy between a marriage by banns, and a marriage by notice before the registrar. *Ibid*.

(*t*) As to marriages according to the usages of the Quakers or Jews, see 19 & 20 Vict. c. 119, s. 21.

(*u*) These are the hours prescribed by the 62nd canon, and hence are commonly called the canonical hours. See 4 Geo. 4, c. 76, s. 21.

sacerdotally. Nay, they are as sacred and religious. For a perfect marriage, in whatever form contracted, must always be the same in its nature and its consequences. It is divine by divine appointment. It can never, therefore, exist as a merely civil contract. Its solemn character and its mystic attributes, are entirely independent of ecclesiastical observances. But while we say this much on the one hand, it must be owned, on the other, that unreflecting and ignorant persons will be apt to regard with levity an engagement entered into in a manner so little calculated to awaken seriousness. It is in this point of view that the ritual, the ceremonies, and the admonitions of the Church, are of incalculable value. For which reason it is a source of congratulation, even to the authors of the latter series of statutes themselves, that, except for purposes of registration, much less resort has been had to their machinery than might have been anticipated; the people of this country being, in general, satisfied with the liberty afforded by the Act, although most of them recoil from its exercise.

Who may marry. The parties must have attained the age of 14 in the male and 12 in the female, and there must be the requisite consents.

Other requisites.

The law which regulates the constitution of the Marriage Contract being now stated, let us see who are capable of entering into this relation (*x*). And first, we may observe that no persons are competent to bind themselves in matrimony until they have attained the age of consent, which, by the common law (following the Roman), is fixed at fourteen in males and twelve in females; not, as some writers affirm, because the parties are then supposed to have sufficient discretion to appreciate the consequences of so critical and responsible an engagement; but because in general they have by that time arrived at physical maturity, and the worst social evils would ensue from holding them incapable of marrying. Not only must the parties be of the proper age, but they must secure the requisite consents; the late Act having in that respect made no change (*y*).

(*x*) A man "*civiliter mortuus*" is not incapable of marriage according to the law of England. *Kynnaird v. Leslie*, 35 L. J., C. P. 226, 233.

(*y*) 6 & 7 Will. 4, c. 85, s. 10. See also Form of Licence, Schedule C. After due publication of banns no evidence of the consent of the guar-

dians is necessary. But the banns must be correct; otherwise the marriage will be void. There are many hard resolutions to this effect, founded upon reasoning more specious than just. Sir William Scott said, that banns should be in the true name of the parties; "other-

Distinction between banns and licences.

They must have competent mental understanding, and competent corporal capacity. So likewise, we may remark, that neither of the parties can enter into the contract if married at the time to another individual; in which case, besides the penalties of bigamy (z), it is evident that, if the first marriage be legally good, the second must, of necessity, be legally bad. And here, it may be added that, by Lord Lyndhurst's Act (a), marriages between persons within the prohibited degrees of consanguinity and affinity are now *ipso facto* void, and not merely voidable (b).

OF FORFEITURES UNDER 4 GEO. 4, c. 76, AND
6 & 7 WILL. 4, c. 85.

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As preliminary to the investigation upon which we are about to enter, it is proper to intimate here, that the validity or invalidity of the Marriage Contract will not be discussed in the following pages; the objects of which are mainly directed to a practical inquiry into the effects of the contract and its inci-

This work limited to the effects of the marriage contract.

wise no one would be put on their guard by the publication." The same strictness is not required in a marriage Licence; for which Sir William Scott assigns this reason: that "it is granted by the ordinary on the evidence which he is contented to receive; namely, the oath of the party, as required by the canons of the Church." See *Rex v. Inhabitants of Tibshelf*, 1 Barn. &

Ad. 190; *Lane v. Goodwin*, 3 Gale & Davison, 610; *R. v. Wroton*, 4 B. & Ad. 640.

(z) 24 & 25 Vict. c. 100, s. 57.

(a) 5 & 6 Will. 4, c. 54.

(b) As to the illegality of marriage with a deceased wife's sister, see *Brook v. Brook*, 27 L. J., Ch. 401; *Fenton v. Livingstone*, 7 W. R. (H. L.) 671; *Reg. v. Chadwick*, 17 L. J., M. C. 33.

In certain cases those effects do not arise.

dents assuming such contract to be valid. But in certain cases those effects are prevented from arising; and it is proper to state such cases at the outset.

We have seen that the marriage of persons under age may have unquestionable validity, although entered into without the consent of guardians. Such marriages, however, though not void, are nevertheless forbidden by the law; and it sometimes happens that parties eager to effect matrimony commit a fraud in order to get rid of the effects of this legal interdiction.

Provisions of the 4 Geo. 4, c. 76, s. 16.

What, then, are the consents required? The 16th section of the 4 Geo. 4, c. 76, enacts:—

Consent of guardians required to marriages of infants.

That the father of any person under twenty-one (not being a widower or widow); or if the father shall be dead, the guardian or guardians of the person of the party so under age, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such person so under age, *unless there shall be no person authorized to give such consent.*

Where guardians are non compos, &c.

By the 17th section it is enacted:—

That in case the father or fathers of the parties to be married, or of one of them, shall be non compos mentis, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary to the marriage, shall be non compos mentis, or beyond the seas, or shall unreasonably or from undue motive withhold consent, an application may be made to the Court of Chancery by petition in a summary way; and if the proposed marriage shall appear proper, a judicial declaration to that effect may be made, which shall be as effectual as if a consent had been duly had from guardians.

It has been decided that this clause does not apply to the case of a father who is beyond the seas, or unreasonably withholds his consent, but only to a case in which he is *non compos mentis* (a). In *Cook v. Fryer* (b), on the proposed marriage of an infant daughter of one who was *non compos mentis*, a petition was presented to the Lord Chancellor, under this section, for his consent, in order to obtain a licence. The

(a) *Exp. I. C.*, 3 Myl. & Cr. 471.

(b) 1 Hare, 498.

petition was referred to the Master, and the intended husband by affidavit stated, that he had agreed to make a certain settlement. The Master reported in favour of the marriage; and the report was confirmed. The parties did not avail themselves of the consent of the Lord Chancellor; but shortly afterwards married under the 6 & 7 Will. 4, c. 85, without licence. The settlement mentioned in the affidavit was not made; the parties having entered into articles for a different settlement. It was held by Vice-Chancellor Wigram, that the proposal laid before the Master amounted to a contract which, in the absence of any settlement properly substituted for it, the Court would enforce.

The first inquiry, therefore, in every case must be whether the parties when they intermarried were of lawful age, and, if not of lawful age, whether the requisite consents were obtained; because, although the want of such consent will not invalidate the marriage, it will produce a consequence which some may think a greater calamity; for by the 23rd section of the 4 Geo. 4, c. 76, it is enacted:—

That, if any marriage by licence shall be procured by a party to such marriage to be solemnized between persons one or both of whom shall be under age (not being a widower or widow), by means of such party falsely swearing; or if any marriage by banns shall be procured by a party thereto to be solemnized between persons one or both of whom shall be under age (not being a widow or widower), such party knowing that such person under age had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of this Act, and having knowingly caused or procured the undue publication of banns (c), then, and in every such case, it shall be lawful for his Majesty's Attorney-General, by information in the nature of an English bill in the Court of Chancery (d), at the relation of a parent or guardian of the minor, to sue for a forfeiture of all property which hath accrued or shall accrue to the party so offending by force of such marriage: and such Court shall have power to declare such forfeiture, and thereupon to direct that such property shall be secured for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the Court shall think fit. And if both the parties so contracting marriage shall in the judgment of the Court be guilty of such

Forfeitures by reason of fraudulent marriages without consent of guardians.

(c) See *Gompertz v. Kensit*, L. R., 13 Eq. 369; *Templeton v. Tyree*, L. R., 2 P. & M. 420; *Greaves v. Greaves*, *ibid.* 423.

(d) Now, by an action in the High Court of Justice; Rules of Supreme Court, 1883, Ord. I. r. 1.

INTRODUCTORY REMARKS.

offence, it shall be lawful for the Court to settle and secure such property immediately, for the benefit of the issue of the marriage, subject to such provisions for the offending parties as the Court shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other (e).

The clause, of which only an abridgment is here given, requires that, before any information is filed in pursuance of it, the case be made out to the satisfaction of the Attorney or Solicitor-General, upon oath (f). It has been decided (g), that where a husband incurs a forfeiture under this clause, the Court has no discretion to mitigate the penalty; but is bound to settle and secure all property, present and future, of the wife, for the benefit of herself and the issue of the marriage.

Form of
settlement.

The provisions of this section are satisfied by a settlement for the benefit of the wife and the issue of the marriage in such terms as to exclude the husband from all estate or interest which he might otherwise have acquired by force of the marriage; but there is no necessity to exclude him from the general power of appointment conferred on the wife in the event of there being no children of the marriage (h).

The proper form of settlement, as determined in *Attorney-General v. Lucas*, is, that the whole of the wife's property should be vested in trustees upon trust for her during her life for her separate use without power of anticipation; and that "if there be no children the wife should have a power of appointing the whole during the coverture by will, and, if she survive her husband, either by deed or will: if there be children, and the wife dies first, then the whole to go to the children, if sons at twenty-one, and, if daughters, at twenty-one

(e) As to the extension of these provisions to the marriages of Quakers and Jews, see 6 & 7 Will. 4, c. 85, s. 43; to marriages celebrated abroad, 12 & 13 Vict. c. 68; and to marriages before the registrar, 19 & 20 Vict. c. 119, s. 19.

(f) By the 24th section of the same Act, "all agreements, settle-

ments and deeds, entered into or executed upon marriages, in relation to which such informations as aforesaid shall be filed," are made void.

(g) *Attorney-General v. Mulla*, 4 Russ. 329.

(h) *Attorney-General v. Lucas*, 2 Ph. 753; see also *Attorney-Gen-*

or marriage: but if she survive her husband, then two-thirds to the children of the marriage, and one-third to be subject to her appointment by deed or will."

In order to avoid the expense of a settlement the fund will in proper cases be settled by the order of the Court (i). Settlement by order of Court.

The Attorney-General should be represented separately from the relators (k). Where the husband *alone* incurs a forfeiture, the Court has no authority to order any settlement of the wife's property on her issue by any subsequent marriage (l).

ral v. Clements, L. R., 12 Eq. 32; and *Attorney-General v. Read*, L. R., 12 Eq. 38, where Bacon, V.-C., reluctantly followed the decision in *Attorney-General v. Lucas*. It will be observed that according to the minutes in *Attorney-General v. Clements* (L. R., 12 Eq. 37) the husband was excluded from the general power of appointment; but the actual judgment contained no such exclusion. See the Form of Order declaring the trusts in case of forfeiture in Seton, p. 768.

(i) *Attorney-General v. Clements*, L. R., 12 Eq. 32; *Attorney-General v. Akers*, Seton, 768.

(k) *Attorney-General v. Read*, L. R., 12 Eq. 38.

(l) *Attorney-General v. Mullay*, 7 Beav. 351. In order to sustain an information, a false affidavit that a party is of full age is equivalent to a false affidavit that the necessary consent to a minor's marriage has been obtained. And it is not necessary to show that the minor was entitled at the time of the marriage to any property, either in possession, reversion, remainder or expectancy. *Attorney-General v. Severne*, 1 Coll. 313. A husband charged with procuring his marriage with a minor by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts on an information. *Attorney-General v. Lucas*, 2 Hare, 566.

Part First.

Showing the Operation of General Rules unaffected by Special Contract.

CHAPTER I.

RIGHTS ARISING FROM THE MARRIAGE.

SECTION I.

CHATTELS PERSONAL IN POSSESSION.

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Respective
interests of
husband and
wife.

IN treating of the rights of parties arising from the fact of marriage, it may be observed at the outset, that the wife did not under the old law, and does not under the present law, take any estate or interest in the property of her husband ; while, on the other hand, the husband acquired under the old law, rights and interests, absolute or qualified, in the property of the wife, which it is now proposed to explain, in the first place, as they existed under the common law, and secondly, as they have been modified and ultimately abolished by recent legislation. The rights and interests of a surviving husband or wife in the property of the deceased spouse will form the subject of separate consideration.

In order to understand the doctrine of the common law upon this subject, it is necessary to bear in mind that, according to a legal fiction of the ancient jurists, the husband and wife became one person in law, or rather the personality of the wife was merged in that of the husband. This principle was carried out to its logical result, so far as rights of property were concerned; but it was qualified, if not abandoned, when it was necessary to consider the *acts* of the wife. As to these, the wife was regarded as distinct from her husband, but so entirely under his power and control that she could do nothing of herself, but everything by his licence and authority.

Chap. I. s. 1.

Old principle.

The order in which it will be most convenient to consider this subject will be—(1) Chattels personal; (2) Chattels real; and (3) Real estate; the questions arising on Choses in action being reserved for consideration in a subsequent chapter.

Under both the old and the present law, chattels personal, which before the marriage belonged to the husband, continue to belong to him exclusively after the marriage. Chattels personal in possession, on the other hand, belonging to the wife in her own right of whatever kind or denomination, which she was beneficially possessed of at the date of the contract, or which came to her during the coverture, and specific chattels or goods in the hands of a third person, were under the old law absolutely bestowed upon the husband by virtue of the marriage (*a*); so that he could dispose of them in any way he pleased, whether he survived her or not. The right of property in them was, by the marriage, established in the husband exclusively, so that, even if he died in the lifetime of his wife without recovering the specific chattels or goods, they would belong to his representatives, and not to the wife by right of survivorship.

Chattels personal of husband.

Chattels personal of wife under the old law.

The phrase "chattels personal in possession," as here used, includes all moveables of the wife, such as jewels, household goods and the like, and cash in her hands; but not money at her

(a) "Marriage is an absolute gift of all chattels personal in possession in the wife's own right, whether the husband survive the wife or no." Co. Litt. 300.

Chap. I. s. 1. bankers, which, unless deposited in a sealed bag, is probably a chose in action (*b*).

Bills of exchange. Bills of exchange and promissory notes payable to the wife had this resemblance to chattels personal in possession, that instantly upon the marriage the husband alone could negotiate and pass them by indorsement, the wife being rendered incapable of so doing by the disabilities of coverture (*c*).

General position of wife in respect of personal property. The general position of a wife with respect to her personal property was summed up in Chitty on Contracts thus (*e*):—

A married woman cannot acquire any legal right to personal property during her coverture; and if she have any money or goods in her possession, and she lend the one or sell the other, the right to recover the debt or the value of the property thus parted with vests in the husband.

Statutory modifications. Such, according to the common law, were the rights and interests acquired by the husband in respect of his wife's personal property, whether it belonged to her at the date of the marriage or was subsequently acquired during the coverture. It is now necessary to state the modifications of these rights and interests which have been introduced by modern legislation.

Act of 1870. By the Married Women's Property Act, 1870 (*f*), which came into operation on the 9th August, 1870, the following descriptions of property, to which formerly the husband became entitled by virtue of the marriage, were declared to belong to the wife for her separate use:—

(1) The wages and earnings of any married woman acquired

(*b*) *Carr v. Carr*, 1 Mer. 543, n.; *Hill v. Foley*, 1 Phill. 399; 2 H. L. Cas. 28. In this case it was decided by the House of Lords that the relation between banker and customer was only the ordinary relation between debtor and creditor, and that, therefore, cash at a banker's was merely money lent. *Garnett v. M'Kewan*, L. R., 8 Ex. 10. As to "the wife's choses in action," see *post*, p. 30.

(*c*) *Barlow v. Bishop*, 1 East, 432. The husband also acquired by the marriage a right to reduce into pos-

session the wife's choses in action. But the wife's property in these was not divested by the marriage. For, on the contrary, it remained in her during the coverture, and survived to her after her husband's death, unless he, in his lifetime, had reduced them into possession. The rights of the husband and the wife in the wife's choses in action are treated of subsequently. See *post*, Chap. I. s. 5.

(*e*) P. 157, 7th ed.

(*f*) 33 & 34 Vict. c. 93.

or gained by her after the passing of the Act in any employment, occupation or trade in which she was engaged, or which she carried on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic or scientific skill, and all investments of such wages, earnings, money or property (g). Chap. I. s. 1.

(2) Any deposit in a savings bank, and any annuity granted by the Commissioners for the Reduction of the National Debt in the name of a married woman, or in the name of a woman who might marry after such deposit or grant (h).

(3) Any sum forming part of the public stocks and funds, and not being less than 20*l.*, entered in the bank books in the name of any woman as a married woman entitled to her separate use (i).

(4) Shares or stock of any joint stock company to the holding of which no liability was attached, registered in the books of the company in the name of any woman as a married woman entitled to her separate use (k).

(5) The share, benefit, debenture, right or claim in, to, or upon the funds of any industrial and provident society, friendly society, benefit building society, or loan society, to the holding of which no liability was attached, and which was entered in the books of the society in the name of any woman as a married woman entitled to her separate use (l).

(6) All personal property to which any woman married after the passing of the Act became entitled as next of kin, or one of the next of kin, of an intestate (m).

(7) Any sum of money not exceeding 200*l.* to which any woman married after the passing of the Act became entitled under any deed or will (n).

(8) The rents and profits of any freehold, copyhold or

(g) Sect. 1. As to what is separate trading on the part of the wife, see *Ashworth v. Outram*, 5 Ch. D. 923; *Lovell v. Newton*, 4 C. P. D. 7.

(h) Sect. 2.

(i) Sect. 3. Extended to Consolidated Stock of the Metropolitan

Board of Works by 34 & 35 Vict. c. 47, s. 14.

(k) Sect. 4.

(l) Sect. 5.

(m) Sect. 7.

(n) *Ibid.*

Chap. I. s. 1. customaryhold property which descended upon any woman married after the passing of the Act as heiress or co-heiress of an intestate (*o*).

Act of 1882. By the Married Women's Property Act, 1882 (*p*), which came into operation on the 1st January, 1883, the doctrines of the common law affecting the property of women on marriage have been almost entirely abrogated. In the case of marriages contracted after the commencement of the Act, they are completely swept away; and in the case of marriages contracted before that date, they are destroyed as to property the title to which accrues after the commencement of the Act.

With the exception, therefore, of property acquired before the 1st January, 1883, the right of the husband to the property of the wife during the coverture has been abolished, and the fact of marriage no longer effects any alteration in a woman's right to, or power over, her property.

(*o*) 33 & 34 Vict. c. 93, s. 8.

(*p*) 45 & 46 Vict. c. 75.

SECTION II.

CHATELS REAL.

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Under both the old and the present law chattels real which, before the marriage, belonged to the husband, continue to belong to him exclusively after the marriage (q).

Under the old law chattels real which, before the marriage, Old law. belonged to the wife, fell, by virtue of the marriage, so much under the dominion of the husband that, except in one particular, they were entirely at his disposal. He could alienate and dispose of them at pleasure, so the transaction took effect in his lifetime, that is to say, by act *inter vivos*. But during the marriage, there was this qualification of his right, (and it was the only restraint on his otherwise unrestricted dominion)—namely, that he could not by will bequeath his wife's chattels real to the exclusion of her claim by survivorship—for, if she outlived him, she was entitled to them unless the property had been changed by an act completed in his lifetime.

(q) *Hill v. Edmunds*, 5 De G. & Sm. 603.

Chap. I. s. 2.

But if he was the survivor he had them absolutely.

On the other hand, if the husband were the survivor, his wife's chattels real became *his* absolutely; to be disposed of by him, either by deed or will (*r*). For he was considered to have had during the marriage possession of them by a kind of joint tenancy with his wife; so that, upon her pre-deceasing him, he had them by force of his marital right, and not as her representative. It follows, therefore, that in order to secure his wife's chattels real, the husband surviving her was not obliged to take out administration to her (*s*). The alienation by the husband of his wife's chattels real, if completed in his lifetime, might be with or without consideration (*t*).

His agreement bound her surviving.

And since that, which for a valuable consideration is agreed to be done, is considered in equity as actually performed, it would appear that if the husband had agreed to dispose of his wife's chattel real, as, for example, of her legal term for years, such agreement or covenant would be enforced against the surviving wife (*u*).

Her legal term and her trust term.

If he assigned the wife's legal term, the wife was clearly bound. And if he assigned her trust term, she was also bound; upon the principle that equity, to preserve uniformity in titles to estates, follows the law. But in the case of a trust term, the wife might claim her equity to a settlement (*v*).

Elegits, &c.

If a woman sued out an elegit, and then married, her husband was at liberty to assign this interest of his wife as he might think proper; and so also with respect to statutes merchant and statutes staple (*x*).

When only

The power which the law gave the husband to alienate the

(*r*) As to chattels real which could not possibly vest in the wife during coverture, see *Duberley v. Day*, 16 Beav. 33.

(*s*) 1 Roll. Abr. 345; 2 Black. Com. 435. And where the wife was entitled to an equitable reversionary interest in long leaseholds, and died before she became entitled in possession, it was held that it was not necessary for the husband to take out letters of administration

to his deceased wife in order to complete his title to them. *Re Bellamy*, 25 Ch. D. 620.

(*t*) *Mitford v. Mitford*, 9 Ves. 87.

(*u*) *Bates v. Dandy*, 2 Atk. 207; *Steed v. Cragh*, 9 Mod. 43. See also *Clarke v. Burgh*, 2 Coll. 221, and *Druce v. Denison*, 6 Ves. 385.

(*v*) See equity to settlement, *post*. *Sturgis v. Champneys*, 5 My. & Cr. 97.

(*x*) 1 Rep. 181.

whole interest of the wife in her chattels real, necessarily authorized him to dispose of *part* of it. If, therefore, the husband, being possessed of a term for forty years in right of his wife, or jointly with her, demised it for *twenty* years reserving rent, and died, such demise, or underlease, would be good against her, although she survived him; but the residue of the original term belonged to her, as undisposed of by her husband (y).

Chap. I. s. 2.

part alienated
the residue
survived.

The husband might defeat his wife's survivorship by other acts besides express alienation; thus, if at the time of her marriage she were a lessee for years, and her husband took a lease of the land for both their lives, this would amount to a disposition of the term; because, by the acceptance of the second lease, the term would be considered as surrendered by operation of law (z).

Acts of dispo-
sition besides
express alien-
ation.

The husband's power extended also over his wife's reversionary interests in chattels real, even over those that were dependent on contingencies not determining in his lifetime (a).

If the husband mortgaged the wife's chattels real, and if, by payment of the money *on the day*, the estate of the mortgagee ceased, it would seem that the wife's right by survivorship was not affected (b).

Mortgage by
the husband
of wife's
chattels real.

Such a mortgage might operate on the legal interest but leave the equity of redemption untouched, as in *Pitt v. Pitt* (c), where a *feme sole*, having mortgaged a leasehold for years, afterwards married. The mortgage was then transferred; the husband joining in the transfer, and covenanting to pay the money. During the coverture the husband, by gradual payments out of his own property, reduced the money due upon the mortgage.

Effect of such
mortgage on
the equity of
redemption.

(y) *Sym's case*, Cro. Eliz. 33; 1 Rolle, Abr. 344, pl. 10; *Growte v. Lowcroft*, Moore, 395.

(z) Si feme, lessee pur an, prist Baron qui puis accept un novel leas pur leur vies, ceo est un surrender del primer leas. 2 Rolle, Abr. 495, pl. 50.

(a) *Donne v. Hart*, 2 Rus. & Myl. 360. See also *Major v. Lans-*

ley, 2 Rus. & Myl. 355. In *Box v. Jackson*, 1 Drur. 48, Lord Chancellor Sugden said, "He was happy that the doctrine of *Purdew v. Jackson* had not (in *Donne v. Hart*, and *Major v. Lansley*) been extended to chattels real."—See *Purdew v. Jackson*, 1 Russ. 1.

(b) 1 Bop. 184.

(c) Turn. & Rus. 180.

Chap. I. s. 2. By his will he made a disposition of the mortgaged premises, and died in the lifetime of his wife. Upon a bill by the wife, who claimed to be entitled by survivorship, to redeem the mortgage, the redemption was decreed to her, upon the terms that the husband's estate should stand in the place of the mortgagee for the sums paid by him out of his own property in reduction of the mortgage debt.

Case of Clarke v. Burgh. In a case before Vice-Chancellor Knight Bruce (c), it was held that the widow was similarly entitled to the equity of redemption; the transaction showing nothing which betokened an intention, on the husband's part, of defeating that right. It appeared that he had executed mortgages of his wife's chattel leaseholds. This was considered as dealing with the property only to the extent of the legal interest;—the equity of redemption remained unaffected. The following remarks of his Honor put the thing very clearly :—

That these alienations became absolute at law no one can doubt, as the money was not paid at the time appointed. They became absolute at law in the husband's lifetime. It is clear, however, that the assignment has never become absolute in Equity. The only intention on the part of the husband was to give the alienees security for the money advanced. It does not appear to me the wife's rights in Equity are more prejudiced than if a mere deposit of the deeds had been made by the husband. The mortgages are mere pledges or charges, and nothing more.

Principle of
this decision.

This decision seems to have proceeded on the principle that, where a husband's mortgage is made by an instrument which discloses no intention of doing more than simply making a mortgage, the Court will regard the proceeding with an inclination to believe that nothing more was intended than that which was necessary to constitute a sufficient security for the money advanced; and not upon the principle that there had not been a reduction of the chattels into the husband's possession (d). In *Mitford v. Mitford* (e), Sir William Grant states :—
“There are some legal interests which do not admit, or stand in need, of being reduced into possession, being in possession

(c) *Clarke v. Burgh*, 2 Coll. 221. 1 Russ. 1.

(d) See *post*, “The wife's choses in action,” and *Purdew v. Jackson*, (e) 9 Ves. 87.

already, and not lying in action; as terms of years and other chattels real" (f). Chap. I. s. 2.

The husband's agreement to mortgage the wife's chattels real was enforced against her only to the extent of the money due (g). Husband's agreement to mortgage.

If the husband were outlawed or attainted, his wife's chattels real were forfeited to the Crown (h): they were also liable to execution for his debts (i). Forfeiture on his outlawry. Liability for his debt.

All these principles as to the right of the husband to the wife's chattels real during the coverture were swept away by the Married Women's Property Act, 1882 (k), and are now obsolete, except in the case of marriages contracted before the 1st January, 1883, and even then are applicable only to property, the title to which accrued before that date. Present law.

SECTION III.

REAL ESTATE.

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Under both the old and the present law, real estate which before the marriage belonged to the husband continues to belong to him exclusively after the marriage. Husband's real estate.

Real estate, on the other hand, which belonged to the wife before the marriage, or might come to her during the marriage, was under the old law placed by the marriage under the Wife's real estate by the old law under the dominion of the husband.

(f) See *Box v. Jackson*, 1 Drur. 48, where Lord Chancellor Sugden says the doctrine of *Purdew v. Jackson* has not been extended to chattels real.

(g) *Bates v. Dandy*, 2 Atk. 207.

(h) Plowd. 263; 2 Black. 434.

(i) Co. Litt. 351; 2 Black. 434.

(k) 45 & 46 Vict. c. 75.

Chap. I. s. 3. dominion of the husband; a dominion, however, limited by and commensurate with the coverture. By the marriage the husband acquired, and during the marriage enjoyed, a freehold interest in his wife's real estate for their joint lives; both being seised together in her right by entireties (*l*); the effect of which was to put the ownership during the coverture entirely in the husband's power. Hence he could alienate that ownership at pleasure, and his conveyance would pass his freehold interest without the wife's co-operation.

So, likewise, he might of course charge such estate of his wife for their joint lives; the charge, however, ceasing with the marriage, unless he became entitled as tenant by the curtesy.

But not the fee.

Which, however, she could not dispose of without her husband's concurrence.

But the ultimate property, that is to say, the inheritance or fee of the estate, was not in the husband, whose marital right was bounded by the coverture. It remained in the wife herself, subject to the husband's rights, and could be dealt with, by the joint act only of both the married parties; for the wife was by the disabilities of coverture precluded from disposing of it without her husband's concurrence (*m*).

Present law.

By the Married Women's Property Act, 1882 (*n*), this right of the husband to his wife's real estate during the coverture was abolished, except in the case of marriages contracted before the 1st January, 1883, and even then it subsists only in respect of real estate, the title to which accrued before that date.

(*l*) Litt. s. 291; 1 Inst. 187 b; Tit. 18, c. 1, s. 35; *Owen v. Morgan*, 3 Rep. 5; *Robinson v. Comyns*, Cas. Temp. Talb. 164. 167, n. b., where the report of Lord Talbot's observations is corrected on the authority of Mr. Booth, which correction is confirmed by Mr. Butler. In Piggot's Treatise of Com. Rec., p. 72, it is stated that a husband seised jointly with his wife, whether by moieties or entireties, or seised only in right of his wife, may create an estate of freehold during the coverture, and thereby make a good tenant to the

præcipe. Of this learning, Blackstone, in his popular way, gives the practical result in his Commentaries, vol. 2, p. 433, where he holds, that in the wife's real estate the husband enjoys only a title to the rents and profits during the coverture; for the real estate, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs if she dies before him.

(*m*) As to the method of disposition, see *post*, p. 59.

(*n*) 45 & 46 Vict. c. 75.

SECTION IV.

FRAUD ON THE MARITAL RIGHT, &c.

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The right of the husband to the property of his wife was regarded in the light of a consideration for the burthens imposed upon him by the marriage; and, accordingly, it was held that she ought to do nothing during the matrimonial treaty whereby the marital right might be defeated or impaired. Any secret disposition of her property during the courtship was considered a fraud upon the husband, from the consequences of which he was entitled to be relieved (*n*), even though he did not know of the existence of the settlement, and though ten years had elapsed since the marriage (*o*). The secrecy of the proceeding was a material element from which fraud might have been inferred (*p*). For it did not appear necessary to make out a case of actual and positive deception (*q*). However, a conveyance made, even immediately before marriage, was *primâ facie* good (*r*), and

Secret disposition by wife during treaty of marriage.

(*n*) The leading case on this subject is *Strathmore v. Bowes*, 1 White & Tudor's L. C. 446, 5th ed.; 2 Bro. C. C. 345; 1 Ves. jun. 22, 28. See also *Howard v. Hooker*, 2 Cha. Rep. 81; 1 Eq. Ca. Abr. 59; *Carlton v. Earl of Dorset*, 2 Vern. 17, where, so early as 1686, it was decided that a settlement made by a woman before her marriage for her separate use, without the husband's privity, was void as against him. A secret settlement made by a woman whilst under a treaty of marriage, though liable to be set aside in equity, was not necessarily void at law: *Doe d.*

Richards v. Lewis, 11 C. B. 1035. As to where the fraud related to a chose in action of the wife's not reduced into possession by the husband, see *Grazebrook v. Percival*, 14 Jur. 1103.

(*o*) *Goddard v. Snow*, 1 Russ. 485.

(*p*) *England v. Downs*, 2 Beav. 522.

(*q*) *Taylor v. Pugh*, 1 Hare, 608.

(*r*) Per Lord Langdale in *England v. Downs*, 2 Beav. 522. But see 1 Roper, 166, where Mr. Jacob in a note says, "a conveyance made during the treaty of marriage is *primâ facie* fraudulent."

Chap. I. s. 4. could be impeached only on proof of fraud; and the establishment of such fraud depended on the circumstances of each case.

Secus if before the treaty and meritorious.

If the transaction were before the marriage treaty (s), or if the transaction took place while the treaty of marriage was in progress, and it might be inferred that the husband had notice of it before his marriage, he could not impeach it (t).

The marital right of the husband was also held to be excluded where a voidable settlement of the wife's property had been made on a previous marriage, if it had been adopted by the wife while discovert (u), or by her and her husband during the second coverture (v).

And still more if he concurred in it.

Actual concurrence on the part of the intended husband, in a settlement made by the wife before marriage, will be still more conclusive against him (x); and, even though he were a minor, will preclude all subsequent allegations of fraud on the marital right (y). In a recent case (z), however, the decision in *Slocombe v. Glubb* was explained by Lord Selborne, L. C., as resting on the principle that the husband who took a benefit under the settlement, could not reject it in part and accept it in part.

If a woman about to marry parted with or charged her property, or contracted a debt for valuable consideration, though the transaction were concealed from the intended husband, it was no fraud on the marital right (a).

It must be a fraud on the particular husband complaining.

The husband seeking redress was bound to show, not only that a marriage was contemplated by his wife at the time of the disposition of her property, but that *he* was the person intended (b).

Effect of Act of 1870 on this doctrine.

It would seem that a fraud on the marital right of the husband might have been committed by a woman about to be

(s) *King v. Cotton*, 2 P. Wms. 675. 382.

(t) *St. George v. Wake*, 1 Myl. & Kee. 610. See also *Griggs v. Staplee*, 2 De G. & Sm. 572; *Wrigley v. Swainson*, 3 De G. & Sm. 458.

(u) *Ashton v. M'Dougall*, 5 Beav. 56.

(v) *White v. Cox*, 2 Ch. D. 387.

(x) *Maber v. Hobbs*, 2 Y. & C. Ex. 317; *Ashton v. M'Dougall*, 5 Beav. 56; *Loader v. Clarke*, 2 Mac. & G.

(y) *Slocombe v. Glubb*, 2 Bro. C. C. 545. See however *Nelson v. Stocker*, 4 De G. & J. 458.

(z) *Kingsman v. Kingsman*, 6 Q. B. D. 122.

(a) *Blanchet v. Foster*, 2 Ves. sen. 264; *Llewellyn v. Cobbold*, 1 Sm. & Giff. 376.

(b) *England v. Downes*, 2 Beav. 522.

married who, without the knowledge of her husband, transferred property into her intended name "as a married woman entitled to her separate use" under sects. 3, 4 or 5 of the Married Women's Property Act, 1870. Chap. I. s. 4.

The foregoing summary is of practical importance only in cases where the marriage has taken place prior to the 1st January, 1883, as, under the present law, the marital right being abolished, there can be no fraud committed upon the husband. Unimportant since 1 Jan. 1883.

The marital right was also protected against any disposition by will made by a woman before her marriage; for by the 1 Vict. c. 26, s. 18, which, so far as women were concerned, was declaratory of the existing law, it was enacted:—

That "every will made by a man or woman shall be revoked by his or her marriage; (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, executor, or administrator, or the person entitled as his next of kin under the Statute of Distributions)."

Wills revoked by marriage.

This applies to all wills made after the 1st January, 1838.

Before the passing of this act, a will made by a woman *dum sola*, was revoked by her subsequent marriage; but when a man made a will it was not revoked by his subsequent marriage alone, but was revoked by marriage and the birth of a child. The principles on which the distinctions rested are ably expounded by Sir E. V. Williams, in his valuable work on Executors and Administrators (*c*). Law before the Wills Act.

A submission to arbitration was formerly revoked if one of the parties, being a single woman, married before the award (*d*). And it made no difference that the arbitrator in making his award had no notice of the marriage (*e*). Submission to arbitration.

It was said, but not without reasons to the contrary, that if the wife, *dum sola*, executed a warrant of attorney, it was revoked by her subsequent marriage (*f*); but on the other hand, that if she *accepted* a warrant of attorney, it was not revoked by her subsequent marriage; and that the Court would give Warrant of attorney.

(c) Vol. 1, 190, 8th ed.

8 Cl. & F. 30.

(d) Com. Dig. Arbitrament, D. 5;
Andrews v. Palmer, 4 B. & Ald.
250, p. 252; *M'Cann v. O'Ferrall*,

(e) 1 Bac. Abr. 270; *Charnley v. Winstanley*, 5 East, 266; 2 Rop. 72.
(f) 2 Rop. 68.

Chap. I. s. 4. leave to enter up judgment upon it (g). Under the old law the marriage constituted a breach of the covenant to abide by the award, for which damages could have been recovered in an action against the husband and wife (h); but now the submission to arbitration is no more revoked by the marriage of a woman than of a man.

SECTION V.

WIFE'S CHOSSES IN ACTION.

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Under old
law.

It is still important to consider the law relating to the choses in action of the wife as it existed before the recent Act: for where the marriage took place, and the title of the wife accrued, before 1st January, 1883, the rights of the parties depend upon

(g) *Marder v. Lee*, 3 Burr. 1469. (h) *Charnley v. Winstanley*, 5 East, 266.

the law as it stood prior to that date. In all other cases choses Chap. I. s. 5.
New law. in action being by the Married Women's Property Act, 1882 (i), included in the term "property" (k), a married woman is entitled to recover and hold her choses in action as if she were a feme sole, and the marital right of the husband to these, as well as to all other kinds of property, is during the coverture wholly excluded; but where the husband survives the wife, and her choses in action are not disposed of by her will or otherwise, it would appear that the Act of 1882 has not deprived him of his right to them; but that, in order to recover them, he must take out administration to his wife in the same way as before the passing of the Act (l).

The right which the wife had to her choses in action was not divested by marriage, but was liable to be divested by an act done in the marriage state; that is to say, the husband might appropriate his wife's choses in action by reducing them into possession. In this way, and in this way only, could he divest her right of property and defeat her claim by survivorship (m). Her right not
divested by
marriage.

The wife's choses in action are not to be confounded with her goods or specific chattels in the hands of third parties, the property in which was by the marriage taken out of her and vested in her husband; whereas the right which before the marriage she had to her choses in action remained in her, notwithstanding the marriage, unless something were done in the marriage state, whereby that right was put an end to (n). Choses in
action diffe-
rent from
chattels in the
hands of third
parties.

Choses in action may consist of debts, money on deposit (o), arrears of rent (p), legacies, residuary personal estate, trust What are
choses in
action.

(i) 45 & 46 Vict. c. 75.

(k) *Ibid.* s. 24.

(l) See *post*, "Rights arising from the dissolution of the marriage."

(m) *Gaters v. Madeley*, 6 M. & W. 423; *Sherrington v. Yates*, 12 M. & W. 855; *Prole v. Soady*, L. R., 3 Ch. 220; *Aitchison v. Dixon*, L. R., 10 Eq. 589; *Scrutton v. Pattillo*, L. R., 19 Eq. 369. The assignee of the husband was in this respect in the same position as the

husband. See *post*.

(n) *Hutchings v. Smith*, 9 Sim. 137.

(o) *Scrutton v. Pattillo*, L. R., 19 Eq. 369.

(p) In a suit to carry into execution the trusts of a will, it was ordered that the receiver should, out of the rents, pay to H., the devisee, a *feme covert*, 400l. a year for her separate use, and on her own receipt, by way of maintenance. It was held by Lord Chancellor Sug-

Chap. I. s. 5. funds, stock, bills of exchange and promissory notes, and other personal property recoverable by action (*p*).

Although the property in the wife's choses in action was not changed by the marriage, yet by the marriage the husband acquired a power of suing for and recovering them; and so making them his own, by converting them in fact into chattels personal in possession; and payment ought, during the marriage, to be made to the husband, not to the wife, except as his agent.

The law on the subject of the wife's choses in action was thus stated by Sir Thomas Plumer in *Purdeu v. Jackson* (*q*):—

Marriage (he says) is only a qualified gift to the husband of the wife's choses in action upon condition that he reduce them into possession during its continuance. The wife's right is not divested by the marriage. The chose in action continues to belong to her; so that, if the husband happen to die before his wife, she, and not his personal representative, will be entitled to it. The husband, therefore, acquires no right to his wife's chose in action. Reduction into possession is a necessary and indispensable preliminary to his having any right of property in himself, or to his being able to convey any right of property to another. If he does not perform this condition in his lifetime, the right of his widow after his death continues unaltered, exactly as if she had never married (*r*).

Marriage did not operate as a severance of the wife's joint tenancy in any species of property, except possibly chattels personal (*s*); and, of course, in the case of marriages since the Married Women's Property Act, 1882 (*t*), as the wife's property remains her own, no severance will in any case take place.

Whether the chose in action had been reduced into possession was in each case a question of fact; but "nothing has ever been held to amount to reduction into possession of a wife's chose in

Reduction
into possession.

den that this allowance was not a chose in action; that it was a portion of the estate of H. in the lands; and that it was not an interest therein distinct from the estate vested in her: *Rochard v. Fulton*, 1 Jones & Lat. 413.

(*p*) *Gaters v. Madeley*, 6 Mee. & Wel. 423; *Nash v. Nash*, 2 Mad. 133; 1 Rep. 211. It is apprehended that a wife's general cash balance at her

bankers *dum sola* must be included in the list of her choses in action. See *Hill v. Foley*, 2 H. L. Cas. 28. (*q*) 1 Russ. 1.

(*r*) See Jacob's note to 2 Roper, 521, where the above is confirmed. See, however, *Re Biaggi*, W. N. 1882, p. 65.

(*s*) *Armstrong v. Armstrong*, L. R., 7 Eq. 518.

(*t*) 45 & 46 Vict. c. 75.

action which does not give the husband for some moment of time absolute dominion over the property without any concurrence of the wife" (u). The difficulty, which has occasionally arisen in determining this question, may be illustrated by referring to the following cases, in which the courts decided what did, and what did not, constitute a reduction of the fund into possession, so as to defeat the right of the wife by survivorship. Chap. I. s. 5.

The actual receipt of a debt by the husband amounted, of course, to a reduction into possession of such debt (x); and it was held that the receipt, by an agent appointed by the husband and wife, of money forming part of the estate of an intestate of which the wife was administratrix, amounted to a reduction into possession by the husband of the wife's distributive share of the money (y). What is sufficient reduction into possession.

The mere circumstance of the legal title being changed, (without more), did not in general affect a married woman entitled to a share of a trust fund (z); but the transfer, at the request of the husband, of a trust fund to new trustees who were nominated by him, and who were to hold the fund on new trusts, upon an agreement or understanding that it should be settled for the benefit of the wife, has been treated as a reduction of the fund into possession so as to exclude the wife's title by survivorship (a); and it seems that the transfer to new trustees, and the declaration of trust by the husband, must be connected together so as to constitute one transaction (b).

A married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock which was

(u) Per Fry, J., in *Nicholson v. Drury Buildings Estate Co.*, 7 Ch. D. 48, at p. 55. It would be sufficient if the fund was at any moment in the hands of a person against whom the husband might have brought an action for money had and received to his use: *Aitchison v. Dixon*, L. R., 10 Eq. 589.

(x) *Rees v. Keith*, 11 Sim. 388.

(y) *Re Barber*, 11 Ch. D. 442.

(z) *Burnham v. Bennett*, 2 Coll. 254. See also *Cunningham v. Antrobus*, 16 Sim. 436; *Cogan v. Duffield*, L. R., 20 Eq. 789; 2 Ch. D. 44.

(a) *Hansen v. Miller*, 14 Sim. 22.

(b) *Burnham v. Bennett*, 2 Coll. 254.

Chap. I. s. 5. standing in the name of a trustee for her. This stock was, under an order made in the lunacy, transferred to the name of the Accountant-General in the matter of the lunacy; and part of it was afterwards sold out and applied in payment of the costs. The lunatic died, leaving the wife him surviving. In these circumstances it was held by Lord Chancellor Lyndhurst, that the stock had been reduced into the possession of the lunatic; and that the wife was not entitled to it by right of survivorship (c).

What is not
sufficient
reduction into
possession.

The receipt by the husband of part of a debt, reduced into possession only what was actually received (d). In like manner the receipt of interest did not constructively reduce the debt into possession (e).

In *Wildman v. Wildman* (f), a wife having become entitled to a distributive share of personal estate, consisting of Three per Cent. stock, the administrator transferred her share into her name, describing her as the wife of John Wildman. Part of the stock was subsequently transferred by her with the assent of her husband, signified by his signing his name to each transfer; and it was held that what remained at the death of the husband belonged to the wife by survivorship.

A legacy to a married woman was not sufficiently reduced into possession by an appropriation by the executrix of a mortgage to the same amount (g). Nor did the transfer of trust funds from one set of trustees to another operate as a reduction into possession (h). The possession of the estate of a testator by the husband in the character of executor did not affect the title of his wife to a share of the residue (i).

The transfer from the sole name of the wife to the joint names of the husband and wife, of money deposited with mer-

(c) *Re Jenkins*, 5 Russ. 183.

(d) *Nash v. Nash*, 2 Mad. 133;
Scrutton v. Pattillo, L. R., 19 Eq.
369.

(e) *Howman v. Corie*, 2 Vern. 190;
Nash v. Nash, *ubi supra*; *Blount*
v. Bestland, 5 Ves. 515; *Hart v.*
Stephens, 6 Q. B. Rep. 937.

(f) 9 Ves. 174.

(g) *Blount v. Bestland*, *ubi supra*.

See also *Fleet v. Perrins*, L. R., 4
Q. B. 500.

(h) *Ryland v. Smith*, 1 My. & Cr.
53. See *Wall v. Tomlinson*, 16 Ves.
413; *Harwood v. Fisher*, 1 Y. & O.
110.

(i) *Baker v. Hall*, 12 Ves. 497;
Wall v. Tomlinson, *ubi supra*.

chests of a fund in Court (*k*), or of shares (*l*), in a joint-stock company (*m*), did not amount to a reduction into possession by the husband. In *Parker v. Lechmere* (*n*) a legacy to which a married woman was entitled, was paid by the executor's cheque drawn to the order of the husband and wife. They received the cheque, signed a joint receipt, and having duly endorsed the cheque went together to the bank, where the wife handed the cheque to the manager, and, in the presence and with the consent of her husband, instructed the manager to open an account in her name, and to place to her credit part of the proceeds of the cheque, and to credit the residue to the account of her husband. The subsequent course of dealing was wholly in favour of the account being that of the wife alone, and accordingly Fry, J., held that the legacy had never been reduced into possession by the husband, and that even if it had, there had been a valid gift by the husband to the wife.

The transfer, in contemplation of marriage, of an intended wife's property to trustees, prevented the husband from having any right in respect of a reduction into possession (*o*).

The assignment, even for valuable consideration, by the husband of a fund in Court, to which his wife was entitled, would not bar her right to the fund, in the event of the death of her husband, or a divorce being obtained, before the fund had been paid out to the assignee (*p*).

A mere deposit, by way of equitable mortgage, by a husband of the deeds of property, upon which his wife had a security for the repayment of money, did not bar her right by survivorship to such security (*q*).

If a bond were given to the wife, and the husband did not reduce it into possession, it survived to the wife (*r*).

(*k*) *Scrutton v. Pattillo*, L. R., 19 Eq. 369. 213.

(*p*) *Prole v. Soady*, L. R., 3 Ch. 220.

(*l*) *Prole v. Soady*, L. R., 3 Ch. 220.

(*q*) *Michelmores v. Mudge*, 29 L. J., Ch. 609.

(*m*) *Nicholson v. Drury Buildings Estate Co.*, 7 Ch. D. 48.

(*r*) *Coppin v. —*, 2 P. Wms. 495; *Day v. Padrone*, 2 Mau. & Sel. 396, n.; 1 Rep. 212.

(*n*) 12 Ch. D. 256.

(*o*) *Wollaston v. Berkeley*, 2 Ch. D.

Chap. I. s. 5.

Effect of
termination of
coverture.

The right of a husband to reduce his wife's *choses in action* into possession is terminated by dissolution of the marriage (*s*), or judicial separation (*t*); and, on the death of the divorced wife, her executors, and not the husband or his assignees, are entitled to a fund not reduced into possession (*u*). The order absolute takes effect from the date of the order *nisi*; and, accordingly, reduction into possession by the husband during that interval is ineffectual to defeat the title of the wife (*x*).

A wife who had obtained a protection order, under 20 & 21 Vict. c. 85, s. 21, since in such a case the marriage subsists, was able to give a good receipt for a legacy bequeathed to her (*y*).

The reduction into possession of his wife's chose in action must be effected by the husband while he retains that character, and the cases, which decide that the husband's right of reduction into possession is terminated by divorce, stand on a different footing from those in which the effect of divorce upon marriage settlements is considered. The husband had the right to reduce the choses in action of his wife into possession, because he filled the character of husband at the time; whereas the rights and interests under a settlement are fixed at the date of its execution. In dealing with the latter class of questions, the Court seems to have been occasionally misled by the analogy of the cases relating to choses in action, but it is now settled that the husband's rights under a settlement are not forfeited by the dissolution of the marriage (*z*).

(*s*) *Wells v. Malbon*, 31 Beav. 48; *Heath v. Lewis*, 4 Giff. 665.

(*t*) *Re Insole*, L. R., 1 Eq. 470; *Johnson v. Lander*, L. R., 7 Eq. 228. See 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8.

(*u*) *Wilkinson v. Gibson*, L. R., 4 Eq. 162.

(*x*) *Prole v. Soady*, L. R., 3 Ch. 220.

(*y*) *Re Coward and Adams' Purchase*, L. R., 20 Eq. 179.

(*z*) *Evans v. Carrington*, 2 D. F. & J. 481; *Fitzgerald v. Chapman*,

1 Ch. D. 563; *Burton v. Sturgeon*, 2 Ch. D. 318; overruling *Jessop v. Blake*, 3 Giff. 639; *Swift v. Wenman*, L. R., 10 Eq. 15; and *Fussell v. Dowding*, L. R., 14 Eq. 421. As to the power of the Court, after a final decree for dissolution of the marriage, to vary the provisions of a settlement, see 22 & 23 Vict. c. 61, s. 5; 41 & 42 Vict. c. 19, s. 3. The latter enactment has been decided to be retrospective in *Ansdell v. Ansdell*, 5 P. D. 138; see however *Yglesias v. Yglesias*, 4 P. D. 71.

What should be a sufficient reduction into possession by the husband to bar the wife's survivorship is to be collected from the cases. Mere intention would not do. There must have been *acts*; and those acts must have had the effect of divesting the right of property in the wife and establishing it in the husband absolutely (*a*).

Chap. I. s. 5.
Reduction into possession.

Where an action was necessary in order to reduce a chose in action of the wife into possession, it had to be brought in the names of both the husband and the wife (*b*), but if she died pending the action, it was held that it abated (*c*).

How wife's chose in action recovered.

As to the wife's negotiable securities, however, as bills of exchange and promissory notes, which were made payable to her when sole, the rule was different. The husband alone, and not the wife, could indorse them; and, by so doing, give his indorsee the right of suing on them in his own name (*d*). He was, therefore, held to have the same right in himself; for he alone, and not his wife, could recover payment of them. She was not necessarily joined in the action as co-plaintiff (*e*). Still, if the husband died without having reduced them into possession, these securities would, as choses in action, survive to the wife (*f*).

Wife's negotiable securities.

It was held that, if the wife were a co-plaintiff in an action

When judgment sur-

(*a*) *Blount v. Bestland*, 5 Ves. 515; *Howard v. Oakes*, 18 L. J., Ex. 485; *Bird v. Pegrum*, 22 L. J., C. P. 166; *Att.-Gen. v. Partington*, 33 L. J., Ex. 281; *Rawlins v. Birkett*, 4 W. R. 795.

(*b*) Per Lord Kenyon, C. J., in *Milner v. Milnes*, 3 Term Rep. 631. When the chose in action accrued due, not while the wife was sole, but during the coverture, it has been said that it is optional in the husband to join his wife as co-plaintiff. But in *Wills v. Nurse*, 1 Adol. & Ell. 65, Tindal, C. J. (delivering the judgment of the Exchequer Chamber on a writ of error) said—"This case resembles that of a bond given to the wife during coverture. The interest of the wife

forms a substratum upon which her right to join in an action may be founded." See also *Hart v. Stephens*, 6 Q. B. Rep. 937. But see *infra*, "Rights arising from the dissolution of the marriage by the death of the husband," and "by the death of the wife."

(*c*) *Checchi v. Powell*, 6 Barn. & Cres. 253.

(*d*) *Barlow v. Bishop*, 1 East, 432; 1 Rep. 214.

(*e*) *M'Neillage v. Holloway*, 1 Barn. & Ald. 218; *Exp. Barber*, 1 Glyn & Ja. 1.

(*f*) *Howard v. Oakes*, 3 Ex. 136; *Gaters v. Madeley*, 6 M. & W. 423; *Richards v. Richards*, 2 B. & Ad. 447; *Sherrington v. Yates*, 12 M. & W. 855.

Chap. I. s. 5. for the recovery of a chose in action, and the husband died after judgment, but before the suing out of execution, the judgment would survive to her (*g*).

On the other hand, if before the marriage the wife had obtained a judgment, and she and her husband sued out a *scire facias*, and obtain an award of execution, the property would belong to the husband (*h*).

Effect of joint decree. As a joint judgment would survive to the wife if her husband died before execution were awarded, so would a joint decree, unless an order had been obtained to pay the money to the husband, or declaring that it belonged to him (*i*).

Costs ordered by rule of court to be paid to husband and wife were held to survive to her (*j*). But where an award was expressly to *pay to the husband*, and, before any further proceedings, he died, his wife's claim was held to have been defeated (*k*).

Effect of failure to reduce into possession. The effect of the husband's failure to reduce the wife's choses in action into possession was, that in the event of his predeceasing her, she was entitled to them by survivorship; and in the event of her predeceasing him, he, in order to get at them, had to take out administration to her (*l*).

If, after the wife's death, the husband died before her outstanding personal chattels were recovered, his next of kin were entitled to them in equity. In a case, therefore, where the wife had been a mortgagee in fee, her surviving husband was held entitled to the mortgage as her administrator, and her heir was considered to be a trustee for him (*m*).

Assignment in equity. The husband's power of reducing his wife's chose in action into possession was assignable; but always subject to the wife's right by survivorship (*n*). The value of the assignment, there-

(*g*) 1 Rep. 212, and the cases there cited.

(*h*) 1 Rep. 212.

(*i*) 1 Rep. 216; 10 Ves. 91; and see *Heygate v. Annesley*, 3 Bro. C. C. 362.

(*j*) *Tilt v. Bartlett*, Hanmer, 104.

(*k*) *Oglander v. Baston*, 1 Vern. 396; 1 Rep. 219.

(*l*) See further on this subject, "Rights arising from the dissolution of the marriage by the death of the husband;" and "by the death of the wife;" *post*.

(*m*) *Turner v. Crane*, 1 Vern. 170; 1 Rep. 205.

(*n*) *Whittle v. Henning*, 2 Phill. 731.

fore, depended upon its being made available by reduction into possession before the wife's claim could arise. For it was settled that all such assignments, whether by operation of law or by the act of the husband, passed only the interest which the husband himself had in the subject-matter; namely, an interest liable to be defeated by his death before reduction into possession, leaving his wife him surviving (o). Chap. I. s. 5.

Accordingly, the assignee was in no better situation than the assignor; and he, too, must have reduced the subject into possession, in order to make his title good against the wife surviving (p).

The chose in action might be of such a nature as not to admit of immediate reduction into possession, for example, where it consisted of a reversionary interest in a trust fund: the position of the assignee then depended upon the time when the chose in action became capable of such reduction.

Having regard to this condition, three cases arose, which are referred to in the following passage from Lord Lyndhurst's judgment in *Honner v. Morton* (q):—

If at the time of the assignment he is in a condition to reduce the chose in action into possession, the assignment operates immediately. If he is afterwards in a condition to reduce the thing into possession, the assignment will then have full effect; but if he dies before the event happens on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative.

The last of these cases is, where the husband had, neither at the time of the assignment, nor subsequently, the power of reducing the chose in action into possession. Suppose that the husband and wife concurred in assigning to a purchaser for valuable consideration, a fund in which she had a vested interest Where, neither at the time of the assignment nor afterwards, it was capable of reduction into possession.

(o) *Purdew v. Jackson*, 1 Russ. 1.

(p) The interest of the assignee was similarly defeated, if a decree of dissolution of marriage (*Prole v. Soady*, L. R., 3 Ch. 220), or judicial separation (*Johnson v. Lander*, L. R., 7 Eq. 228), or a protection order (*Re Coward and Adams' Purchase*, L. R., 20 Eq. 179; *Nicholson v. Drury Buildings Estate Co.*,

7 Ch. D. 48), were obtained before the reduction into possession of the chose in action, which, in any of those cases, became the absolute property of the wife, as if she were a *feme sole*, even though she might have joined with her husband in a mortgage of the chose in action: *Re Insole*, L. R., 1 Eq. 470.

(q) 3 Russ. 65, p. 86.

Chap. I. s. 5. in remainder expectant on the death of a tenant for life; and suppose, furthermore, that the tenant for life outlived the husband. Here the wife surviving would be entitled to the fund (r).

Where it became capable of such reduction after the assignment.

Secondly, take the case where, although the husband had not the power of reducing the property into possession at the time of the assignment, he acquired that power subsequently. In *Ashby v. Ashby* (s), the husband assigned his wife's reversionary chose in action to a particular assignee for value. He survived the person on whose life the reversion depended; and, therefore, reduction into possession might well have taken place. Yet, inasmuch as he died before the property was actually recovered, the assignment was, by Vice-Chancellor Knight Bruce, held to be void against the surviving wife (t).

Where, both at the time of the assignment and afterwards, it was capable of such reduction.

In the third case, *i. e.*, where, both at the time of the assignment and subsequently, the husband had full power to reduce the property into possession, it was well established that the assignee must, as in every other case, perfect his title by reducing the chose in action into possession during the coverture. He took only what the husband could assign, and it would be "strange if a man should in any way be able to transfer to another, a larger or better interest than he had in himself" (u).

Wife's life interest in trust fund.

The wife's life interest in a trust fund, so far as the annual payments which might accrue after the death of her husband are concerned, was a chose in action which could not be reduced into possession during the coverture; and, in accordance with the decisions in *Purdew v. Jackson* and *Honner v. Morton*, it was held that neither the husband alone, nor the husband and wife together, could dispose of such an interest beyond the duration of the coverture (x).

(r) *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65. See *Duberly v. Day*, 16 Beav. 33.

(s) 1 Coll. 553.

(t) His Honor in so ruling relied upon a case with which, he said, his own opinion agreed, namely, *Ellison v. Elwin*, 13 Sim. 309. See also

Hutchings v. Smith, 9 Sim. 137; *Michelmores v. Mudge*, 2 Giff. 183.

(u) Per Sir W. Grant, in *Mitford v. Mitford*, 9 Ves. 87. See also *Hutchings v. Smith*, 9 Sim. 137; *Le Vasseur v. Scrutton*, 14 Sim. 116.

(x) *Stiffe v. Everitt*, 1 Myl. & Cr. 37; *Harley v. Harley*, 10 Hare, 325.

In the case of *Hore v. Becher* (y), a single woman, being entitled to an annuity for her life, secured by bond, married : and her husband executed a *release* of the bond and died. It was decided that the widow's claim to the future payments of the annuity for her life was barred by the husband's release. With reference to *Stiffe v. Everitt*, Shadwell, V.-C., remarked in this case :—

Chap. I. s. 5.
Effect of a
release.

That was a case of assignment. There is a difference between an assignment and a release. The question there was, whether the husband could pass that right in a chose in action which should survive to the wife after the death of the husband. But here the question is, what is the effect of a release? It is material that the law should be clearly understood on this point. If anything is secured by bond or otherwise to a woman who afterwards marries, the husband may then release the security; and if he releases the security, there is an end of the annuity (z).

It was, however, settled by the decision in *Rogers v. Acaster* (a), that the release by the husband of the wife's reversionary chose in action, was as inoperative as his assignment to bar the wife's right by survivorship. In the judgment, Sir J. Romilly, M.R., observed :—

Release as
inoperative as
assignment.

Where personal property is vested in possession in a husband in right of his wife, he can pass it by assignment; but when a present debt is owing to his wife he may either receive the debt or release the obligation. Thus, in the case of a bond conditioned to pay either a sum down or an annuity for life, I understand that the husband might release the bond, and that, the security being released, there could be no claim after his death; but I do not understand that, in any of the cases cited, it has ever been held that a husband can release a debt which is not due to the wife,

(y) 6 Jur. 44; 11 L. J. (N. S.) 153.

(z) It may be assumed that the difference between an assignment and a release has now been entirely abrogated. It seems to have been only with reference to choses in action that the doctrine was of any importance, and was founded upon the fact that choses in action were not assignable at law. But now, by the Judicature Act, 1873, sect. 25 (6), choses in action may be assigned by writing under the hand

of the assignor, provided that the assignment is not by way of charge only, and that notice thereof is given to the debtor.

(a) 14 Beav. 445. See also *Fitzgerald v. Fitzgerald*, L. R., 2 P. O. 83, where Wood, L. J., in delivering the judgment of the Court, said that the case of *Hore v. Becher* could scarcely be reconciled with the doctrines of a Court of Equity as to the inalienable character of a wife's reversionary interest.

Chap. I. s. 5. but in respect of which the wife may hereafter have an interest. There is a great distinction between a debt due to the wife with an immediate right of action, and a right of action which may arise at a future time. Suppose such a case as this:—A covenant to a wife to pay a sum of money on the death of her husband. Here there is a present obligation, but no right of action until the breach by non-payment after the death of the husband. Could the husband release such an obligation? I apprehend he clearly could not, and no authority has been cited for any such right.

Effect of
wife's consent
in Court.

The Court had no authority to enable the husband, or the husband and wife together, to dispose of her reversionary choses in action, even although she were examined in Court, and were to express her consent that the transfer should be made. Thus, in *Wade v. Saunders* (b), Sir Thomas Plumer, about a year after his decision in *Purdew v. Jackson*, refused to take the consent of a married woman to give up her reversionary interest, in part vested, and in part contingent, in a fund in Court, in favour of a purchaser from her husband (c).

“A wife by her consent in a Court of Equity can only depart with that interest which is the creature of a Court of Equity,—the right, which she has in a Court of Equity, to claim a provision, by way of settlement on herself and children, out of that property which the husband at law would take in possession in her right. Her equity arises upon his legal right to present possession. This principle has no application to a remainder or reversion” (d).

Assignment
not permitted
by collusion
with prior
owners.

It was decided in *Whittle v. Henning* (e), that a wife's reversionary interest in a chose in action could not be accelerated by the assignment to her of all the prior interests, so as to vest in her an absolute and assignable property. Lord Cottenham, L. C., in his judgment, said:—

“It is true that the wife in this case has not only a present life interest from her husband, but the ultimate interest in the fund from her son, and therefore, it is said, has a present absolute title to the whole. This proposition assumes that her reversionary life interests no longer exists; that it is in fact merged in the other interests so conferred upon her by her husband and son. But this can only prevail if the Court should, by

(b) Turn. & Russ. 306.

(c) See *Whittle v. Henning*, 2 Phill. 731. See also *Richards v. Chambers*, 10 Ves. 580; *Woollands v. Croucher*, 12 Ves. 174; *Box v.*

Jackson, Drury, 42.

(d) Per Sir J. Leach, in *Pickard v. Roberts*, 3 Mad. 385.

(e) 2 Ph. 731.

analogy to law, establish an equitable merger for the sole purpose of depriving the wife of this protection to her reversionary interest which it has hitherto afforded" (f). Chap. I. s. 5.

Upon the bankruptcy of the husband, all his interest in his wife's choses in action vested in his trustee; but this assignment by operation of law was subject to the same condition as attached to any other assignment, that is to say, its operation could only be perfected by the actual reduction into possession of the chose in action during the coverture (g). The trustee, moreover, could not maintain an action in his sole name for the recovery of such property, but should sue in the joint names of himself and the wife. And if the husband died before execution, the wife could carry on the action for her own benefit (h). Effect of husband's bankruptcy.

In 1857 an Act (i) was passed, which enabled a married woman by deed to dispose of reversionary interests in personal estate, to which she is entitled under any instrument made after the 31st December, 1857, not being a settlement made on the occasion of her marriage, as fully and effectually as she could do if she were a *feme sole*. The husband must concur in the deed by which such disposition is made, and it must be acknowledged by her in the manner prescribed by the Acts for the Abolition of Fines and Recoveries (k). Malins' Act.

When a married woman is entitled, by virtue of an appointment made since the 31st December, 1857, under a power in an instrument executed before that date, her interest is not one which can be disposed of under the Act: the later deed being regarded as incorporated in that from which it derives its efficacy (l).

(f) See also *Story v. Tonge*, 7 Beav. 91; *Brandon v. Woodthorpe*, 10 Beav. 463. The decision in *Whittle v. Henning* has overruled *Lachton v. Adams*, 5 L. J., Ch. 382; *Creed v. Perry*, 14 Sim. 592, and *Hall v. Hugonin*, *ibid.* 595.

(g) See *ante*, p. 32; *Pierce v. Thornley*, 2 Sim. 167.

(h) *Sherrington v. Yates*, 12 Mee. & W. 855; *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atchison*, 7

Q. B. 864.

(i) 20 & 21 Vict. c. 57, commonly called "Sir R. Malins' Act." The text of the Act will be found in the Appendix.

(k) 3 & 4 Will. 4, c. 74, and in Ireland 4 & 5 Will. 4, c. 92. See also The Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7.

(l) *Re Butler's Trusts*, 3 Ir. R., Eq. 138. This Act still applies to interests which accrued before 1st Jan. 1883.

Chap. I. s. 5.

By an assignment duly made under this statute, a married woman is enabled to transfer personal property to which she is entitled in reversion, discharged from her husband's *jus mariti*, as fully and effectually as if she were a *feme sole*, and an absolute title is thereby given to the assignee (*m*).

SECTION VI.

THE WIFE'S EQUITY TO A SETTLEMENT.

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Doctrine of wife's equity to a settlement.

Closely connected with the subject of the wife's choses in action, and other property devolving upon her during coverture, and the rights of the husband therein, was the doctrine of the wife's equity to a settlement. It may be observed, that the law of England furnishes no direct method whereby a husband can be compelled to maintain his wife; but from early times the old Court of Chancery asserted a jurisdiction in favour of the wife; and, wherever a husband sought the aid of equity to enable him to obtain the wife's property, the assistance of the Court was withheld, unless and until a provision was made

(*m*) See judgment of Lord Selborne in *Re Batchelor*, L. R., 16 Eq. 481.

out of the property for the wife, if she required it. The foundation of the right seems to have been the control which Courts of Equity exercised over property falling under their dominion, together with the principle that he who comes into equity must do equity.

Chap. I. s. 6.

In the former editions of this work, the subject of the wife's equity to a settlement received full and detailed consideration; it is now treated concisely, for the recent Act has almost abolished the practical importance of this branch of law. The doctrine, it must be observed, has no application to separate property, that being effectually secured for the use of the wife.

By the Married Women's Property Act, 1882, all the property of women married on or after the 1st January, 1883, and all the property of women previously married, the title to which shall have accrued after that date, is declared to be their separate property. It is, therefore, only in cases of marriages contracted, and property acquired, before the 1st January, 1883, that questions as to the wife's equity can in future arise (n).

Effect of Married Women's Property Act, 1882.

An interesting question arises as to the effect of the Judicature Act (o) upon the doctrine under consideration. All the Courts being amalgamated, and the rules of equity, in cases of conflict or variance, prevailing over those of the common law, there can be no doubt that the wife may claim her equity in any Division of the High Court; and it would seem to follow that, although the doctrine had no relation to property recoverable at law, a husband now seeking to recover a debt or chose in action of his wife's, by force of his legal title, ought to be put upon terms by the Queen's Bench Division in the same way, and to the same extent, as if he had been suing in the Court of Chancery before the Judicature Act. There is, however, no recorded instance of this having been done. It may, indeed, be urged, that when it was declared that the rules of equity should prevail, it was not intended thereby to alter or enlarge the rights of individuals; and that a husband, with a

Whether doctrine affected by fusion of law and equity.

(n) Questions as to the wife's equity may also occasionally arise, where a husband, whose domicile is foreign, seeks to obtain possession

of a fund in the custody of the English Court. See, however, cases cited *post*, p. 52.

(o) 36 & 37 Vict. c. 66.

Chap. I. s. 6. complete legal title, might still assert his legal rights as before the Act. This, however, is not a satisfactory basis on which to rest the wife's equity to a settlement; and the logical result of the amalgamation of the Courts, coupled with the declaration that equitable principles shall prevail, is, that the distinction, which made the wife's equity dependent upon the nature of the property, has been abolished.

When the equity arose.

This equity of the wife to a settlement or provision out of a fund, arose when the interest claimed by the husband in right of his wife was merely equitable (*p*), or where, though legal, it became the subject of a suit in equity. It attached only to property which the husband took in right of his wife, not to property which the wife took in her own right (*q*), and to property to which the wife became entitled before (*r*) as well as after marriage (*s*). It was an obligation which the Court fastened not upon the property but upon the right to receive it; and until this equity was satisfied, no part of the fund, which the husband sought to recover, could be set off against a debt due by him (*t*).

To what it attached.

The equity attached to all property which the husband was entitled to receive in right of his wife, and as well to property in which she had only a life interest (*u*), as to that in which she had an absolute interest. It attached also to a term held in

(*p*) As in the case of an equitable estate in fee, *Smith v. Mathews*, 3 De G., F. & J. 139, or where, for example, a fund is vested in trustees who have the legal estate, the wife, or rather the husband in her right, having only the equitable or beneficial interest. In *Ruffles v. Alston*, L. R., 19 Eq. 546, a doubt was expressed whether in some cases a wife might not be entitled to her equity to a settlement out of a legal debt.

(*q*) *Life Association of Scotland v. Siddal*, 3 De G., F. & J. 271, 276.

(*r*) *Taunton v. Morris*, 8 Ch. D. 453; 11 Ch. D. 779.

(*s*) *Barrow v. Barrow*, 18 Beav. 529.

(*t*) *Carr v. Taylor*, 10 Ves. 574; *Ex parte O'Ferrall*, 1 Glyn & J. 347; *M'Cormick v. Garnett*, 2 Sm. & Giff. 37; *Knight v. Knight*, L. R., 18 Eq. 487; *Re Cordwell's Estate*, L. R., 20 Eq. 644. See also *Osborne v. Morgan*, 9 Hare, 432.

(*u*) *Taunton v. Morris*, 8 Ch. D. 453; 11 Ch. D. 779; and see *Watkyns v. Watkyns*, 2 Atk. 96; *Wright v. Morley*, 11 Ves. 12; *Colmer v. Colmer*, Mos. 113, 118; *Sleech v. Thornington*, 2 Ves. sen. 580; *Peters v. Grote*, 7 Sim. 238; *Coster v. Coster*, 1 Keen, 199; *Gilchrist v. Cator*, 1 De G. & S. 188; *Re Ford*, 32 Beav. 621.

trust for the wife (x). As the equity was founded upon the right to present possession, no settlement could be claimed out of property in remainder or in reversion, until it fell into possession (y). For the same reason that the property must have been property to which the husband was entitled in right of his wife, it was held that where the interest of a husband and wife was that kind of joint tenancy called a tenancy by entireties, as in the case of a legacy to a husband and wife (z), there was no equity to a settlement.

In *Ward v. Ward* (a), where an annuity was settled on the husband and wife during their joint lives, it was held that the husband took the whole income during the joint lives, and that the wife had no equity to a settlement; but in the case of a capital sum or legacy given in such terms, the contingent interest of the wife as survivor was preserved, and the husband was not allowed to defeat it by alienation in her lifetime (b). The wife had no equity to a settlement out of arrears of income which the husband was entitled to receive as it became due (c). But in determining what arrears were to be subject to this rule, the Court had regard to the date of the institution of the suit, and exercised its discretionary jurisdiction in respect of those arrears which might have accrued subsequently to that date (d).

Though there might be an equity to a settlement as against the husband or his assignees, a wife, whose ante-nuptial debts were still unsatisfied, was not entitled to a settlement of the property, until provision had been made from the property for the debts owing by her at the date of her marriage (e).

This right of the wife to an equity to a settlement was principally of importance in those cases where the husband had

Against
whom the
equity arose.

(x) *Sturgis v. Champneys*, 5 My. & Cr. 97; *Hanton v. Keating*, 4 Hare, 1.

(y) *Osborne v. Morgan*, 9 Hare, 432; *Pickard v. Roberts*, 3 Madd. 384.

(z) *Atcheson v. Atcheson*, 11 Beav. 485.

(a) 14 Ch. D. 506; *Godfrey v. Bryan*, 14 Ch. D. 516.

(b) *Atcheson v. Atcheson*, *ubi supra*.

(c) *Re Carr's Trusts*, L. R., 12 Eq. 609; see, however, *Life Association of Scotland v. Siddal*, 3 De G., F. & J. 271.

(d) *Taunton v. Morris*, 8 Ch. D. 453.

(e) *Barnard v. Ford*, L. R., 4 Ch. 247. The principle of this decision seems to be unaffected by the Married Women's Property Acts of 1870 and 1874.

Chap. I. s. 6. assigned the fund to, or charged it in favour of, a particular assignee, or where it had vested in a general assignee under the husband's bankruptcy or insolvency. In those cases in which the husband only was interested, the allowance of the equity depended upon whether or not the wife was already provided with an adequate separate maintenance (*f*). It is clear that she was entitled, even out of property in which she took a life interest only, if her husband failed to maintain her, by deserting her (*g*), or by becoming bankrupt or insolvent (*h*).

As against
general
assignee.

In the case of the husband's bankruptcy or insolvency, the equity was enforced against his general assignee out of the wife's life interests, as well as absolute interests, in property, because, at the time when the title of such assignee was vested, the incapacity of the husband to maintain the wife had already raised the equity for the wife. A general assignee was in the same position as the husband himself, and as against him there was no distinction between a life interest and *corpus* (*i*), and on these grounds the settlement of a legacy to the wife has been held valid against the husband's creditors (*j*).

As against
particular
assignee.

As against a particular assignee for value, the wife's equity to a settlement out of property in which she took an absolute interest was fully established. In such a case, her right to the provision out of the property was not for herself alone, but for herself and her children, and was independent of the acts and conduct of her husband. Moreover, any one claiming under the husband could only take subject to the same equity as the husband. But there was a distinction in the case of a particular assignee for value of property in which the wife took a life interest only: and in such a case, where the husband had, previously to his desertion or inability to maintain his wife, assigned the property for value, the right of the wife did not arise; for the equity by which it was said that the purchaser was to be

(*f*) *Aguilar v. Aguilar*, 5 Madd. 414; *Spicer v. Spicer*, 24 Beav. 365; *Giacometti v. Prodders*, L. R., 8 Ch. 338.

(*g*) *Gilchrist v. Cator*, 1 De G. & Sm. 188.

(*h*) *Brown v. Clark*, 3 Ves. 166; *Lumb v. Milnes*, 5 Ves. 517; *Wright*

v. Morley, 11 Ves. 12; *Jacobs v. Amyatt*, 1 Mad. 376, n.; *Squires v. Ashford*, 23 Beav. 132.

(*i*) *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Taunton v. Morris*, 8 Ch. D. 453; 11 Ch. D. 779.

(*j*) *Montefiore v. Behrens*, L. R., 1 Eq. 171.

bound might not exist at the time of the purchase, and depending upon the conduct of the husband, might never come into existence (*k*). Chap. I. s. 6.

In the case of a particular assignee for value, if the husband, at the time of the assignment of his wife's life interest, was *not* maintaining her, the equity for a settlement arose. If, on the other hand, the husband *was* maintaining her at the time of the assignment, but afterwards failed in the performance of that duty, the equity did not arise (*l*); because the assignee who became a purchaser *bonâ fide*, when the husband and wife were living together, ought not to suffer on account of any subsequent difference arising between the married parties.

According to former opinions, it was only where the husband appeared as a plaintiff seeking aid from the Court that the equity came into action. But it was settled later, that the wife herself might assert her right to a settlement, by proceedings instituted against her husband for that sole purpose, through the instrumentality of her next friend (*m*). It was necessary to claim the settlement for herself and her children, and not for herself alone. The wife may assert her claim as plaintiff.

There was no fixed rule as to the amount to be settled: the proportion in each case depended on all the circumstances; and, in fixing it, any previous settlement which might have been made, or any property of the wife's which might have been previously acquired by the husband, was taken into consideration. The amount, therefore, was discretionary in the Court (*n*). Amount settled.

Most frequently one-half of a fund (*o*), in some cases a larger proportion (*p*), was settled, and occasionally the *whole*

(*k*) *Tidd v. Lister*, 10 Hare, 140; *Taunton v. Morris*, 8 Ch. D. 453; 11 Ch. D. 779.

(*l*) And this, too, though the wife's interest was at the time of the assignment reversionary; *Life Association of Scotland v. Siddal*, 3 De G., F. & J. 271, 276.

(*m*) *Elibank v. Montolieu*, 5 Ves. 737.

(*n*) *Green v. Otte*, 1 Sim. & St. 250; *Napier v. Napier*, 1 Dr. & War. 407; *Aubrey v. Brown*, 4 W. R. 425; *Spirett v. Willows*, L. R., 1 Ch. 520; *Re Suggitt's Trusts*, L. R., 3 Ch. 215.

(*o*) *Jewson v. Moulson*, 2 Atk. 417, 423; 1 Rep. 260, and cases there cited; *Spirett v. Willows*, L. R., 1 Ch. 520.

(*p*) *Coster v. Coster*, 9 Sim. 597.

Chap. I. s. 6. fund, where special circumstances were present, such as insolvency on the part of the husband (*q*), inability to support (*r*) his wife, cruelty (*s*), desertion or adultery (*t*), or where the fund was small (*u*), or where the husband had already received part of the fund (*x*).

In cases of insolvency, and of no settlement on the wife, the whole fund, where the interest of the wife was absolute, has been settled, even against a purchaser for valuable consideration from the husband's assignees (*y*), or against the husband's assignees for value (*z*).

Waiver of
the equity by
consent in
Court.

The equity to a settlement might be waived by a married woman if of full age, but not if an infant (*a*); and only upon her consent being formally taken by the Court either upon her separate examination or under a special commission issuing from the Court (*b*); but if the consent had been already given upon examination before a competent tribunal, it would seem that she need not be examined again (*c*).

See, too, *Ex parte Pugh*, 1 Drew. 202; *Vaughan v. Buck*, 1 Sim., N. S. 284; *Napier v. Napier*, 1 Dru. & War. 407; *Ex parte Thompson*, 1 Deac. Bank. Cases, 90; *Re Suggitt's Trusts*, L. R., 3 Ch. 215.

(*q*) *Gardner v. Marshall*, 14 Sim. 575. See also *Re Merriman's Trust*, 10 W. R. 334; *Smith v. Smith*, 3 Giff. 121; *Brett v. Greenwell*, 3 Yo. & Coll. Ex. 230; *Jacobs v. Amyatt*, 1 Mad. 376. It has always been usual to have regard to the amount of the wife's fortune appropriated by the husband. *Bond v. Simmons*, 3 Atk. 20; *Green v. Otte*, 1 Sim. & St. 250; *Francis v. Brook- ing*, 19 Beav. 347; *Scott v. Spashett*, 3 Mac. & G. 599.

(*r*) *Re Cutler*, 14 Beav. 220; *Re Cordwell's Estate*, L. R., 20 Eq. 644.

(*s*) *Oxenden v. Oxenden*, 2 Vern. 493; *Williams v. Callow*, *ibid.* 752.

(*t*) *Wright v. Morley*, 11 Ves. 12; *Dunkley v. Dunkley*, 2 De G., M. & G. 390; *Gilchrist v. Cator*, 1 De

G. & Sm. 188; *Gent v. Harris*, 10 Hare, 383; *Layton v. Layton*, 1 Sm. & G. 179; *Re Disney*, 2 Jur., N. S. 206; *Koeber v. Sturgis*, 22 Beav. 588; *Re Ford*, 32 Beav. 621.

(*u*) *Re Kincaid's Trusts*, 1 Drew. 326; *Re Hooper's Trusts*, 6 W. R. 824.

(*x*) *Scott v. Spashett*, *ubi sup.*; *Ward v. Yates*, 1 Dr. & Sm. 80.

(*y*) *Francis v. Brook- ing*, 19 Beav. 347; *Scott v. Spashett*, 3 Mac. & G. 599.

(*z*) *Marshall v. Fowler*, 16 Beav. 249; *Re Welchman*, 1 Giff. 31; *Duncombe v. Greenacre*, 29 Beav. 578.

(*a*) *Shipway v. Ball*, 16 Ch. D. 376; *Stubbs v. Sargon*, 2 Beav. 496; *Abraham v. Newcombe*, 12 Sim. 566.

(*b*) See 1 Dan. Ch. Pract. 123; Seton on Decrees, 668.

(*c*) *Campbell v. French*, 3 Ves. 321; *May v. Roper*, 4 Sim. 360.

In the case of a ward of Court, whose husband committed a contempt of Court in marrying her, the Court refused to allow the wife to waive her equity (*d*). Chap. I. s. 6.

The consent of the wife was not binding on her if made under a mistake (*e*), and it could be revoked at any time before the transfer of the fund was completed (*f*).

While the amount of the fund was unascertained, the Court would not take the wife's consent (*g*), except in cases where a known fund was liable to diminution, as for costs (*h*).

Where the sum belonging to the wife was under 200*l.* (*i*), or produced less than 10*l.* a year, the practice of the Court was to dispense with the wife's consent, and to order the amount to be paid to the husband, on proof that the fund was not affected by any settlement or agreement for a settlement (*k*).

The order for payment out, where the wife appeared to consent, could not originally be made at the hearing; but afterwards the order was made either at the hearing or on further consideration (*l*).

The evidence required to show that the fund was not affected by any settlement, was an affidavit by the husband and wife that there had been no settlement or agreement for a settlement; if, on the other hand, there was a settlement, it was necessary to produce it; an affidavit, that the fund was not affected thereby being insufficient (*m*). This evidence was dispensed with where the fund was very small, as under 10*l.* (*n*). In later years, it became the practice of the Court, if the whole sum did not exceed 200*l.*, or 10*l.* a year, to pay the amount to the wife and her husband, upon proof of the marriage, and on an affidavit by her and her husband of no settlement or agreement, or, in

Evidence
required.

(*d*) *Stackpole v. Beaumont*, 3 Ves. 1086; *Roberts v. Collett*, 1 Sm. & G. 89. See *Ball v. Coutts*, 1 Ves. & Bea. 138.
300.

(*e*) *Watson v. Marshall*, 17 Beav. 742, n.
363.

(*f*) *Penfold v. Mould*, L. R., 4 1874, r. 52; *Seton on Decrees*, 670.
Eq. 562. (*l*) 13 & 14 Vict. c. 35, s. 28.

(*g*) *Sperling v. Rochfort*, 8 Ves. 163, (*m*) *Rose v. Rolls*, 1 Beav. 270;
180; *Moss v. Dunlop*, Johns. 490; *Britten v. Britten*, 9 Beav. 143.
Anon., 5 Jur., N. S. 1124. (*n*) *Veal v. Veal*, L. R., 4 Eq.

(*h*) *Packer v. Packer*, 1 Coll. 92; 115.
Musgrove v. Flood, 1 Jur., N. S.

Chap. I. s. 6. case of such settlement or agreement, on their affidavit identifying it, and stating that no other settlement or agreement had been made, and an affidavit of their solicitor of his having perused such settlement, and that it did not affect the fund (o).

Where parties
have foreign
domicile.

The equity to a settlement has in some cases been treated, as depending upon the law of the domicile of the parties at the date of the marriage. There can be no doubt that, if a settlement has been executed abroad by parties domiciled abroad, it must be construed in the English Courts according to the foreign law (p), irrespective of equities existing by the law of England; and accordingly the English Courts will not raise an equity to a settlement in favour of the wife in opposition to the provisions of the contract. But it seems doubtful whether, in the absence of express contract, the foreign domicile of the parties, either at the date of the marriage, or at the time of the application, should be allowed to deprive the wife of this right, which is a rule of the English Court rather than a general principle of law. In *Schwabacher v. Becker* (q), Stuart, V.-C., thus expressed the principle on which these cases depend:—

“The wife’s equity to a settlement was an indulgence allowed by the practice of this Court in derogation of the legal rights of the husband. The evidence of the legal rights of the husband, according to the country of the domicil, had nothing to do with the question.”

It should, however, be stated that the Court has not always acted on this principle, but has occasionally regarded the rights of the parties, as depending upon the law which happened to prevail in the foreign country (r).

Equity personal to the wife.

This equity was personal to the wife, and the children of the marriage had no independent equity of their own (s); but when

(o) Ch. Funds Rules, 1874, r. 52.

(p) *Anstruther v. Adair*, 2 My. & K. 513; *Marquis of Breadalbane v. Marquis of Chandos*, 2 My. & Cr. 711, 738. See also *Duncan v. Campbell*, 12 Sim. 616.

(q) 2 Sm. & G., App. iv.

(r) *Sawer v. Shute*, 1 Anst. 63; *Campbell v. French*, 3 Ves. 321;

Dues v. Smith, Jac. 544; *M’Cormick v. Garnett*, 5 De G., M. & G. 278; *Re Swift’s Trusts*, W. N. 1872, p. 195.

(s) *Murray v. Lord Elbank*, 10 Ves. 84; *Lloyd v. Williams*, 1 Mad. 450; *Re Walker*, L. & G. t. Sugd. 299; *Hodgens v. Hodgens*, 4 Cl. & F. 323. But see *Johnson v. Johnson*, 1 J. & W. 472.

a settlement of property was made by the direction of the Court, their interests were included. If, however, the wife died without having obtained a decree (t), or what was equivalent thereto (u), the children had no claim; for they could get nothing except through her instrumentality.

But although the proceedings of the wife might be said to create the children's claim, she could not waive the equity when once it had been established; for, as Lord Hardwicke said, in an anonymous case reported in Vesey, "The wife may give up her own interest, but no one can consent for the children."

After decree the wife could not by waiver defeat children's claim.

In another case, a married woman established her right to a settlement against her husband's assignees, to the extent of one-half of the fund; and it was held by Lord Langdale that she could not afterwards waive the making of the settlement so as to defeat the rights of her children (x).

A decree or order for a settlement always contemplated the interests of the children as well as those of the wife; and if, by any slip, it omitted express mention of the children, they were not allowed to suffer on that account (y).

Interests of children always included.

But where the children had been omitted in the settlement directed by the Court, the omission, if it had been long acquiesced in, would not be supplied after the wife's death (z).

When a settlement was directed, the limitations were in the usual form for the benefit of the wife and children; and it appears to have been finally settled, that a power of appointment by deed or will among the children of the marriage would be given to the wife, in priority to the limitations in favour of the

Form of settlement.

(t) *De la Garde v. Lemprière*, 6 Beav. 344; *Wallace v. Auldjo*, 2 Dr. & Sm. 216; 1 De G., J. & S. 643; *Baker v. Bayldon*, 8 Hare, 210, overruling *Steinmetz v. Halthin*, 1 Glyn & J. 64.

(u) *Lloyd v. Mason*, 5 Hare, 149.

(x) *Whittem v. Sawyer*, 1 Beav. 593. The report is simply, that "it was arranged that half the fund should be conceded by the assignees." Lord Langdale "thought

that the agreement enured for the benefit of the children of the marriage;" adhering afterwards to this opinion, notwithstanding he had had his attention directed to *Barker v. Lea*, 6 Madd. 330. See, contra, *Fenner v. Taylor*, 2 Russ. & Myl. 190; *Pemberton v. Marriott*, 47 L. T. 332.

(y) *Groves v. Clarke*, 1 Keen, 132.

(z) *Johnson v. Johnson*, 1 Jac. & W. 472, 479.

Chap. I. s. 6. children (a); and in a late case (b), a like power was inserted, the covenant by the husband contained in a post-nuptial deed to settle the property on trusts, not including such a power, being disregarded.

If some of the children were otherwise provided for, the terms of the settlement might be varied in respect of them; but it did not, therefore, follow that they were to be excluded (c).

Though now of no practical value, the statement of the case of *Eedes v. Eedes* (d), and the observations upon it, contained in the earlier editions of this work are here inserted, as they possess some historical interest, and show a state of opinion in former years, greatly differing from that now commonly held as to the relations of husband and wife.

Eedes v. Eedes. In this case where there were no children of the marriage, and the wife was in her sixtieth year—where she had indeed for years been living apart from her husband, having left him in consequence of “unhappy differences and incompatibility of tempers and habits” (e); where it appeared, moreover, that in this state of separation she had, without receiving any aid from her husband, meritoriously supported herself by keeping a school; where, in addition to all this, it was shown that “her health had lately failed, that the number of her pupils had decreased, and that she consequently had not the means of maintaining herself” (e); the Court, taking all these circumstances into consideration, and having regard to the fact that “the husband had received divers considerable sums of money in her right” (e), held that she was entitled to have a certain sum of stock which had become payable to her, “divided and

(a) *Spirett v. Willows*, L. R., 4 Ch. 410, 411; *Watson v. Marshall*, 17 Beav. 363; *Carter v. Taggart*, 5 De G. & Sm. 49; 1 De G., M. & G. 286. See, contra, *Gent v. Harris*, 10 Hare, 383; *Re Suggitt's Trusts*, L. R., 3 Ch. 216; *Croxtan v. May*, L. R., 9 Eq. 404; *Walsh v. Wason*, L. R., 8 Ch. 482.

(b) *Oliver v. Oliver*, 10 Ch. D. 765.

See, however, *Re Gowan*, 17 Ch. D. 778, where a joint power of appointment was given to the husband and wife.

(c) *Groves v. Clarke*, 1 Keen, 132.

(d) 11 Sim. 569; conf. *Spicer v. Spicer*, 24 Beav. 365; *Re Erskine's Trusts*, 1 K. & J. 302.

(e) The terms of the Master's Report.

paid, as to one moiety thereof, to the wife, for her separate use, Chap. I. s. 6.
upon her sole receipt" (f).

The particulars of this case have been more fully set out than they appear in Mr. Simons' report; because it is not to be assumed that a wife who leaves her husband on the frivolous ground of "incompatibility of temper and habits," or the vague and indefinite one of "unhappy differences" (phrases which, in courts of justice, mean nothing), is entitled, as matter of right, to claim the benefit of the equity now under consideration. That equity is not dispensed upon the principle of encouraging the separation of married parties. On the contrary, the fact of separation throws upon the wife the burden of showing that she has been deserted by her husband, or that he is unable to maintain her, or that his misconduct has compelled her to quit him. Harshness in the husband, austerity of temper, rudeness of language, sallies of passion, are things to be borne by the wife; and if she separate without other and better causes, the Court will not allow to her alone that which the law intends for the support of both the spouses. It will not, in such a case, give the income to the wife, although the fund may perhaps be settled on the wife and the children; for, as to "unhappy differences," and "incompatibility of temper," in the marriage state, Sir William Scott makes some remarks, which would not be out of place in a court of equity. "When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, might have been, at this moment, living in a state of the most licentious and unreserved immorality" (g).

(f) The terms of the Master's Report, which was confirmed.

(g) *Evans v. Evans*, 1 Hag. Con. Rep. 36. And see *Barrow v. Barrow*, 5 De G., M. & G. 782.

Chap. I. s. 6.

What would
bar the wife's
equity to a
settlement.

Debts incurred by a woman before marriage would disentitle her to a settlement out of property, until the debts were satisfied (*h*).

A married woman might also by a fraudulent act preclude herself from her equity to a settlement (*i*).

A married woman who was entitled to a share of the proceeds of real estate directed to be sold, and joined with her husband in levying a fine of her share, was held to be barred of her equity to a settlement (*k*).

It need scarcely be said that the wife's adultery barred her equity to a settlement (*l*), unless she were a ward of Court, married without its consent; in which case a settlement would be decreed, because the husband (whatever might be the measure of his wife's misconduct) appeared himself before the Court in the attitude of a delinquent (*m*). But the wife's equity has been allowed where both she and her husband were living in adultery (*n*).

An adequate separate provision for the wife secured by settlement would deprive her of this equity, even though the husband was living apart from her (*o*). To bar the wife's equity, the settlement must have been adequate, or, if inadequate, there must have been an express stipulation before marriage, the meaning of the deed plain, and the intention free from doubt (*p*).

(*h*) *Barnard v. Ford*, L. R., 4 Ch. 247; *Bonner v. Bonner*, 17 Beav. 86.

(*i*) *Re Lush's Trusts*, L. R., 4 Ch. 591.

(*k*) *May v. Roper*, 4 Sim. 360. See now 3 & 4 Will. 4, c. 74, s. 77.

(*l*) *Carr v. Eastbrooke*, 4 Ves. 146; *Ball v. Montgomery*, 2 Ves. jun. 191; *Watkins v. Watkins*, 2 Atk. 96; *Duncan v. Campbell*, 12 Sim. 616. But her equity has been allowed under peculiar circumstances; *Re Lewin's Trusts*, 20 Beav. 378.

(*m*) *Bull v. Coutts*, 1 Ves. & Bea. 292, 300.

(*n*) *Greedy v. Lavender*, 13 Beav. 62.

(*o*) *Aguilar v. Aguilar*, 5 Madd. 414; *Spicer v. Spicer*, 24 Beav. 365; *In re Erskine's Trusts*, 1 K. & J. 302; *Giacometti v. Prodgere*, L. R., 8 Ch. 338.

(*p*) *Salwey v. Salwey*, Amb. 692; *Garforth v. Bradley*, 2 Ves. sen. 675; *Druce v. Dennison*, 6 Ves. 385, 395; *Fenner v. Taylor*, 2 R. & My. 190; *Blois v. Lady Hereford*, 2 Vern. 501; *March v. Head*, 3 Atk. 720. But in the case of *Farrer v. Grant*, 7 L. J., Ch. 95, where it was stipulated in the settlement that "all other the personal estate to which the wife was or might become entitled should vest in the husband," it was held that a contingent reversionary in-

It was decided that the husband might by settlement become the purchaser of property of the wife, which otherwise, if not reduced into possession, would not have legally fallen under his marital right (*q*). Chap. I. s. 6.

Thus, the wife's choses in action, not reduced into possession, might by settlement have been made the husband's absolutely, and in such a case the wife's equity to a settlement and also her right by survivorship would be barred. But the mere fact that there was a settlement, by no means proved that the husband became the purchaser of the wife's choses in action, or of all other property which might afterwards come to the wife (*r*). It was necessary to show that this was part of the contract between the parties, either expressed to be part of the consideration of the settlement, or to be presumed from a fair consideration of its contents.

In former editions, a chapter entitled "Wife's Maintenance out of her Equitable Property," was devoted to the consideration of the circumstances in which an annuity of the wife, or her life interest in any property, would, notwithstanding that it was unprotected by any settlement, be applied for her maintenance. The doctrine of "equity to maintenance" appears to have been invented, to meet the cases of annuities or life interests in property, to which it was at one time doubted whether the right of the equity to a settlement attached. But as it has been now settled by *Taunton v. Morris* (*s*), that the equity to a settlement does attach to such interests, and as the application of the doctrine was governed by precisely the same considerations as those upon which the equity to a settlement depended, and is now of little or no practical value, it appears needless to devote

Wife's equity to maintenance.

terest which remained so during the coverture belonged to the wife surviving and not to the executors of the husband.

(*q*) *Lanoy v. Duchess of Athol*, 2 Atk. 444, 448; *Sykes v. Meynal*, 1 Dick. 368.

(*r*) *Heaton v. Hessel*, 4 Vin. Abr. 40, note; *Mitford v. Mitford*, 9 Ves. 87; *Carr v. Taylor*, 10 Ves. 574;

and see *Beresford v. Hobson*, 1 Madd. 362; *Burdon v. Dean*, 2 Ves. 607; *Tomkyns v. Ladbroke*, 2 Ves. sen. 591; *Lady Elibank v. Montolieu*, 5 Ves. 737; *Freeman v. Fairlie*, 11 Jur. 447; *Barrow v. Barrow*, 18 Beav. 529; 5 De G., M. & G. 782.

(*s*) 8 Ch. D. 453; 11 Ch. D. 779.

Chap. I. s. 6. a separate chapter to the subject. Whatever may be instructive or essential has been incorporated in the previous pages. It is only necessary to add that these orders for maintenance were in their nature temporary, being made with a view to the fact that the necessity for them might cease.

Maintenance out of the husband's property might also by virtue of a special contract have been payable to the wife (t).

Fraud upon
this equity.

The Court would not permit this equity to be defeated by any trick or contrivance of the husband. If, therefore, as in *Colmer v. Colmer* (u), he, with a view of deserting his wife, made a fraudulent conveyance of his own and her property to trustees, the Court would follow her property and order her an allowance out of it.

Advances to
wife when she
is entitled
to separate
maintenance.

Persons who made necessary advances of money to the wife, when she was in circumstances which gave her a right to separate maintenance, were entitled to repayment out of her equitable property (x).

(t) *Head v. Head*, 3 Atk. 295.
(u) Mos. 113.

(x) *Guy v. Pearkes*, 18 Ves. 196
See *Re Ford*, 32 Beav. 621.

SECTION VII.

ALIENATION OF THE WIFE'S REAL ESTATE.

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"It cannot be now disputed that when a woman is the owner of real estate to her separate use, she is to all intents and purposes in the position of a *feme sole*, so as to be able to dispose of that estate by will or deed" (u). This concise summary of the law is open to misconception in two particulars. Firstly, the separate use may be limited to her life interest, and she may take a power of appointing the corpus by will only, in which case an attempted alienation by her of the fee simple *inter vivos* would be inoperative (x). Secondly, the separate use being the "creature of equity" does not enable the married woman to deal with the legal estate, whether it is expressly vested in trustees, or the husband is converted into a constructive trustee. In the one case the trustees must concur; in the other, the same procedure must be adopted as in the case of property not settled to the separate use of the wife. Otherwise, although the equit-

Married woman's power over separate estate.

(u) Per Lord Hatherley, L. C., in *Pride v. Bubb*, L. R., 7 Ch. 69.

(x) If, however, the power were to appoint by deed or will the limitations would be regarded as conferring an absolute separate pro-

perty: *The London Chartered Bank v. Lemprière*, L. R., 4 P. C. 572, 595. See *In re Harvey's Estate*, 13 Ch. D. 216, and the remarks on that case in *Pike v. Fitzgibbon*, 17 Ch. D. 466.

Chap. I. s. 7. able fee will be bound, the legal estate will remain outstanding (y). Subject, however, to these two exceptions, a married woman, having real estate settled to her separate use, can dispose of that estate as if she were a *feme sole*. It is, therefore, unnecessary to consider the case of property settled to the separate use of a married woman; and we may also dismiss with a word all "separate property" held by married women under the provisions of the Married Women's Property Acts, 1870 and 1882 (z). This, indeed, is property settled to the separate use of the married woman, and something more; for in this case the intervention of a trustee is not necessary, and her power of disposition extends to the legal as well as the equitable interest (a). After the 31st December, 1882, a devise or conveyance to a married woman and her heirs vests the legal estate in her as if she were a *feme sole*, and she can dispose thereof by her will or by deed without any acknowledgment.

Position of
married
woman under
old law.

This will, of course, be eventually the universal condition of married women's property; but for some years the old law will prevail, and it is, therefore, necessary still to treat the subject apart from the changes introduced by recent legislation.

Considering, then, the case of real estate vested in a married woman without any trust for her separate use, her husband and she are said to be jointly seised in her right; and, as the estate of the husband is limited to the coverture, or to his own life if he is entitled to curtesy, and, as the wife is under disability, no effectual alienation of the estate is possible except under the provisions of an Act of Parliament. The husband being entitled to an estate of freehold during the coverture can, of course, sell or mortgage his interest, but such alienation will not affect

(y) See the remarks in Dav. Conv. vol. ii. pt. i. p. 196.

(z) The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 8, declares that where real estate shall descend upon any woman married after the 9th August, 1870, as heiress or co-heiress of an intestate, the rents and profits shall belong to her for her separate use. This

enactment does not affect the devolution of the legal estate, and it appears doubtful whether the separate use is confined to the life estate, or comprises the fee simple. See *In re Voss*, 13 Ch. D. 504.

(a) The question how far the Act of 1882 applies to trust estates will be discussed in a subsequent chapter.

the inheritance unless the requirements of the Act for the Abolition of Fines and Recoveries are duly observed. Chap. I. s. 7.

The general enabling clause of this Act is as follows:—

After the 31st day of December, 1833, it shall be lawful for every married woman in every case, except that of being tenant in tail, for which provision is already made by this Act (*b*), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this Act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her in concurrence with her husband by surrender into the hands of the lord of the manor, of which the lands may be parcel (*c*).

Fines and Recoveries Act, s. 77.

The scope of this section was enlarged by the Act to amend the Law of Real Property (*d*), by which contingent and future interests in land as well as rights of entry were made assignable by deed, with a proviso that dispositions thereof by married women should be made in conformity with the Fines and Recoveries Act (*e*). And by the same statute (*f*), power was given to married women to disclaim estates or interests in land, with a like qualification as to observing the formalities of the above-mentioned Act.

(*b*) By the 40th section of the Act, it is provided that "if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same, and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as herein-

after directed."

(*c*) Section 90 enacts that married women shall be separately examined on the surrender of equitable estates in copyholds, in the same manner as if such estates were legal.

(*d*) 8 & 9 Vict. c. 106.

(*e*) Sect. 6.

(*f*) Sect. 7.

Chap. I. s. 7.

Acknowledgments of married women.

Examination apart from her husband.

Every deed to be executed by a married woman, for any of the purposes of the Act, (except such as may be executed by her as protector, for the sole purpose of giving her consent to the disposition of a tenant in tail), is required to be acknowledged (*g*) by her before a judge of the High Court or of a county court, or before a perpetual or special commissioner (*h*); and before receiving the acknowledgment of any married woman, the judge or commissioner is to examine her apart from her husband, touching her knowledge of such deed, and to ascertain whether she freely and voluntarily consents thereto; and unless she do so, he is not to permit her to acknowledge the same; and in such case such deed, so far as relates to her execution thereof, shall be void (*i*).

The appointment of perpetual commissioners for each county was authorized by sect. 81; but the object of so appointing them was that they might be at hand to take acknowledgments, not that their powers were to be geographically limited; and it was accordingly decided under sect. 82, that the commissioners need not be appointed for the county in which the acknowledgment is taken (*k*). It has also been decided that they have a lien for their fees on the deed and other documents (*l*).

Where by reason of residence beyond seas, or ill health, or any other sufficient cause, any married woman is prevented from making the acknowledgment in the ordinary manner, a special commission may be issued to take the acknowledgment (*m*).

(*g*) There is no limit as to time when the acknowledgment is to be made. *Re The London Dock Act*, 20 Beav. 490; on appeal, 7 De G., M. & G. 627, where it was held that a disentailing deed by a *feme covert* was effectual although not acknowledged until after enrolment.

(*h*) Sect. 79 as amended by 19 & 20 Vict. c. 108, s. 73, and the Conveyancing Act, 1882 (45 & 46 Vict. c. 39).

(*i*) Sect. 80.

(*k*) *Blackmur v. Blackmur*, 3 Ch. D. 633, overruling *Webster v. Car-*

line, 4 Man. & Gr. 27. See, however, *Re Jane Read*, W. N. 1877, 116, where the Court followed the latter case.

(*l*) *Ex parte Grove*, 3 Bing. N. C. 304.

(*m*) Sect. 83. The Commission may issue to a single commissioner (Conv. Act, 1882, s. 7 (1)), who ought to be a disinterested person, *Ex parte Menhennet*, L. R., 5 C. P. 16, and see the Conv. Act, 1882, s. 7 (3), and the rules made in pursuance thereof.

It was formerly requisite, in addition to the prescribed memorandum of acknowledgment, that the person taking the acknowledgment should sign a certificate on a separate piece of parchment (*o*); which, with an affidavit verifying the same, had to be filed in the Common Pleas (*p*), and thereupon the deed took effect from the date of the acknowledgment (*q*). An index of certificates was directed by the Act to be kept by the officer of the Court (*r*); and office copies were made evidence of the acknowledgment (*s*). This cumbrous procedure has for the future been abolished; and now, where the memorandum of acknowledgment purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged (*t*).

The validity of acknowledgments where the deed was executed before 1st January, 1883, (the date of the commencement of the Conveyancing Act, 1882), depends upon the certificate being duly filed, and the recent Act accordingly provides for the continuance of the former practice so far as regards such deeds (*u*).

The power of disposition conferred upon married women by the Fines and Recoveries Act has been held to extend to a reversionary share of the proceeds of sale of real estate (*x*) and to a mortgage debt, even where it is secured only by a deposit

Interests within the Act.

(*o*) Sect. 84.

(*p*) Sect. 85.

(*q*) Sect. 86.

(*r*) Sect. 87.

(*s*) Sect. 88.

(*t*) The Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (2). By sub-sect. 4 of the same section, and the schedule to the Act, all the provisions of the Fines and Recoveries Act which relate to the certificate (s. 84 in part and ss. 85—88), and also the Act to remove doubts concerning the due acknowledgment of deeds by married women (17 & 18

Vict. c. 75), are repealed. Rules issued in pursuance of the late Act have also repealed, except as to certificates not lodged before the 1st January, 1883, all the previous rules and orders. These existing rules, as well as the above-mentioned statutes, will be found in the Appendix.

(*u*) Conv. Act, 1882, s. 7 (6) and (7).

(*x*) *Briggs v. Chamberlain*, 11 Hare, 69; *Tuer v. Turner*, 20 Beav. 560; *Re Jakeman's Trusts*, 23 Ch. D. 344.

Chap. I. s. 7. of title deeds (*y*); but not where the mortgage debt belongs to trustees as part of a residue, to a share of which the married woman is entitled (*z*). In a case where trustees had, in breach of trust, invested a fund of personalty in the purchase of land, it was decided that married women entitled in reversion could dispose of the land by deed acknowledged; although if it had been personalty they could not have done so (*a*).

The husband is not prevented by bankruptcy from concurring in the deed in the manner required by the 77th section, the disposition being in effect that of the wife alone (*b*); and the husband's concurrence must be evidenced by his actually executing the deed (*c*).

Married
woman's
power to
contract.

A married woman can by deed acknowledged contract so as to bind her real estate (*d*); and she may without a deed acknowledged become bound by election (*e*); but an agreement for the sale of her real estate which is not her separate property, or settled to her separate use, or subject to her general power of appointment, cannot be enforced (*f*); and even when entered into for valuable consideration, and acted on by the other party, it does not acquire validity by reason of "part performance" (*g*). When a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, and the wife afterwards refused to convey, it was held that the purchaser could not compel the husband to convey his interest and accept an abated price (*h*).

In a recent case (*i*) under the identical provisions of the Irish

(*y*) *Williams v. Cooke*, 4 Giff. 343.

(*z*) *Re Newton's Trusts*, 23 Ch. D. 181.

(*a*) *Re Durrant and Stoner*, 18 Ch. D. 106.

(*b*) *Re Jakeman's Trusts*, 23 Ch. D. 344; and see *Re Batchelor*, L. R., 16 Eq. 481; *Cooper v. Macdonald*, 7 Ch. D. 288.

(*c*) *Re Green and The Metropolitan Board of Works*, W. N. 1880, p. 186.

(*d*) *Crofts v. Middleton*, 8 De G., M. & G. 192.

(*e*) *Barrow v. Barrow*, 4 K. & J. 409; and see *Griggs v. Gibson*, L. R., 1 Eq. 685; *Smith v. Lucas*, 18 Ch. D. 531; *Wilder v. Pigott*, 22 Ch. D. 263.

(*f*) *Emery v. Wase*, 5 Ves. 846; *Nicholl v. Jones*, L. R., 3 Eq. 696.

(*g*) *Williams v. Walker*, 31 W. R. 120.

(*h*) *Castle v. Wilkinson*, L. R., 5 Ch. 534; and see Sugden, V. & P. 206, 14th ed.; Dart, V. & P. 499, 5th ed.

(*i*) *Cahill v. Cahill*, 8 App. Cas. 420.

Act (k), the law as to the alienation of real estate by married women was thus summed up by Earl Selborne, L. C.:— Chap. I. s. 7.

"A married woman has, therefore, now by law no power of control or alienation over or with respect to her real estate (not separate), except such as is given to her by statute; and the power thereby given to her is conditional on its execution in the manner which the statute prescribes. In the case before your Lordships that power has not been exercised, because the statutory conditions have not been complied with; and when that is the case, there is no contract of which, according to the established rules and principles of equity, specific performance can be decreed: *Castle v. Wilkinson* (l); *Avory v. Griffin* (m)."

In this case it was definitively laid down that where a stipulation that a married woman shall release or convey her freehold interest in real estate to her husband, is one of the terms of an agreement for the compromise of a matrimonial suit, such stipulation is not binding upon the wife, or upon her real estate (not settled to her separate use), unless the deed has been acknowledged according to the statute (n).

Lord St. Leonards considers it the better opinion that a married woman, having a power of appointment, can bind herself by a contract to sell the property (o).

As the wife could not (except where it was her separate property) alienate her real estate without her husband's concurrence, so neither could she mortgage or charge it. And as the act of alienation must be free and voluntary on her part, so likewise must the act of charging be; the provisions for taking the acknowledgments of married women, already referred to, being applicable in every case where the ultimate fee, or inheritance of the wife's estate, was affected, whether by total or partial disposition.

Charges upon the wife's fee simple.

Upon mortgages executed of the wife's estate by husband and wife for securing payment of his debts, difficult questions occasionally arose. In general, it was construed that the equity of redemption remained in the wife and her heirs. But it

Wife's equity of redemption.

(k) 4 & 5 Will. 4, c. 92, ss. 68, 71.

(l) L. R., 5 Ch. 534.

(m) L. R., 6 Eq. 606.

(n) Compare the previous cases of *Bateman v. The Countess of Ross*,

1 Dow. 235; *Wilson v. Wilson*, 1 H.

L. Cas. 538; *Vansittart v. Vansittart*, 4 K. & J. 62; *Besant v. Wood*,

12 Ch. D. 605.

(o) Sug. V. & P., 14th ed. 206.

Chap. I. s. 7. sometimes happened that the equity of redemption was transferred to the husband and his heirs. The consideration of this subject will be more conveniently dealt with, when we come to examine the rights which arise to the widow on the dissolution of the marriage by the death of the husband; on which occasion we shall also direct attention to another topic of a cognate nature, namely, the equity of the wife to have her estate exonerated, out of her husband's assets, from incumbrances imposed on it during the coverture in respect of his debts.

The concurrence of the husband is, as we have seen, required to enable the wife to make an effectual disposition of her estate; but by the 91st section this concurrence may be dispensed with in certain cases. The words of the section are as follow:—

Sect. 91.

Provided always, and be it further enacted, that if a husband shall, in consequence of being a lunatic, idiot or of unsound mind (and whether he shall have been found such by inquisition or not), or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court-roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife (either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever), it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds or surrenders, to be done, executed, or made by the wife, in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed or made by her in the same manner as if she were a feme sole; and when done, executed or made by her, shall, but without prejudice to his rights as then existing independently of this act, be as good and valid as if the husband had concurred.

Provided always, that this clause shall not extend to the case of a married woman, where under this act the lord high chancellor, lord keeper, or lords commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband.

Concurrence
of husband,
when dis-
penssed with.

Therefore, if a husband labour under incapacity (*p*), if his residence be unknown, if he be in prison, or if he be living apart

(*p*) As from lunacy, *Re Turner*, 3 C. B. 166; infancy, *Re Haigh*, 2 C. B., N. S. 198.

from his wife (g), the High Court may dispense with his concurrence in any deed to be executed by his wife, which, but for this enactment, would, without his concurrence, have been invalid. The Court, however, unless the husband be beyond reach, will require evidence that a proper application has been made to him for his concurrence, and that it has proved unsuccessful (r). The cause, too, of his non-concurrence must appear to be such as to justify the Court in dispensing with his concurrence (s).

Where the husband and wife had for many years lived separate, and the husband had been found lunatic, an order was made, on the affidavit of the wife setting forth the facts of the case, that she might be at liberty to dispose, without the concurrence of her husband, of certain lands to which she was entitled as tenant in tail in possession, and tenant in fee simple in possession (t).

An affidavit by the wife herself will in no case be dispensed with (u). In the case of *Ex parte Shuttleworth*, the concurrence of the husband was dispensed with, on an affidavit stating that the wife was married to him in the year 1816, that he left her in 1820, that she had never heard or received any information respecting him since, that his present residence was altogether unknown to her, that she was entitled in her own right to the entirety of certain copyhold premises, which she had been compelled to mortgage: and, finally, that if the application were not complied with she would be liable to incur a forfeiture (x).

In another case an order was made, where the parties were living apart by mutual consent, and the husband refused to join unless part of the purchase-money was paid to him (y).

(g) As to the form of rule to dispense with the husband's concurrence when he is separated from his wife by sentence of divorce, see *Ex parte Duffill*, 5 Man. & Gr. 378.

(r) *Re Mirfin*, 4 Man. & Gr. 635.

(s) *Re M. Williams*, 1 Man. & Gr. 881. Thus the Court will not dispense with the husband's concurrence upon an affidavit merely stating that the wife had left her

husband in consequence of his violence, and was living apart from him: *In re Price*, 13 C. B., N. S. 286.

(t) *Ex parte Thomas*, 4 Moore & Sc. 331.

(u) *Re Williams*, 2 Scott, N. U. 120.

(x) *Ex parte Shuttleworth*, 4 Moo. & Sc. 332, n.

(y) *Re Woodcock*, 1 C. B. 437.

Chap. I. s. 7.

In *Ex parte Anne Shirley* (z), the Court authorized a *feme covert* to convey her copyhold property; her husband having resided abroad for more than twenty years with another woman.

Evidence
required.

The non-concurrence of the husband must be satisfactorily accounted for (a); and to obtain an order on a presumption of death arising from his absence, the wife must make an affidavit negating any communication from him during such absence (b).

When the application is founded on the husband living apart from his wife, it should in general be proved that he does not contribute to her support, but if he refuses to concur merely for the purpose of extracting money, the order will be made independently of that consideration (c). The order may be made not only where the wife is beneficially interested, but also where she is a trustee (d). Evidence is required in both cases of a previous application to the husband to concur and of his refusal to do so (e). The section also applies to the legal estate in property devised to the separate use of a married woman without the intervention of a trustee (d), and to a conveyance for the purpose of releasing dower (f).

The order will, as a general rule, be made only to give effect to a particular contract (g), but where the applicant was poor, the property small, and a sale by auction desirable, a prospective order was made (h).

Order, when
set aside.

An order obtained by fraud or suppression of facts will be set aside (i); but a clear case is required, and especially where the rights of third parties have intervened (k). Where an order has

(z) 5 Bing. N. C. 226.

(a) *Re M. Williams*, 1 Man. & Gr. 881.

(b) *Re A. Horsfall*, 3 Man. & Gr. 132. See also *Ex parte Thomas*, 4 Moo. & S. 331; *Ex parte Yarnall*, 17 C. B. 189; *Re Smith*, 16 Law J., C. P. 168; *Re Squires*, 25 Law J., C. P. 55.

(c) *Re Woodcock*, 1 C. B. 437; *Ex parte Robinson*, L. R., 4 C. P. 205; *Re Caine*, 10 Q. B. D. 284. See *In re Alice Rogers*, L. R., 1 C. P. 47.

(d) *Re Haigh*, 2 C. B., N. S. 198; *Re Caine*, *supra*.

(e) *Re Mirfin*, 4 Man. & Gr. 635.

(f) *Re Woodcock*, *supra*; *Ex parte Duffill*, 5 Man. & Gr. 378.

(g) *Re Graham*, 19 C. B., N. S. 370; and see *Re Cloud*, 15 C. B., N. S. 833.

(h) *Re Mary Hart*, W. N. 1882, 36.

(i) *Re Alice Cockerell*, 4 C. P. D. 39.

(k) *Re Alice Rogers*, L. R., 1 C. P. 47.

been made dispensing with the husband's concurrence, the deed of the wife need not be acknowledged by her (*l*). Chap. I. s. 7.

By the Settled Land Act, 1882 (*m*), large powers of dealing with real estate are conferred upon tenants for life and other limited owners (*n*). Such persons, for example, can sell the settled land or any part thereof (*o*), and grant building, mining and agricultural leases upon the terms prescribed by the statute (*p*). Settled Land Act, 1882.

It is not within the scope of the present work to enter fully into the consideration of this Act, but it is necessary to consider its provisions so far as they relate exclusively to married women ; and it should be remembered that it received the royal assent a few days before the Married Women's Property Act, 1882, although both measures came into operation on the same day.

The effect of the 61st section of the Act, which is printed *in extenso* in the Appendix, seems to be that where a married woman is a limited owner within the meaning of the Act, and is entitled "*for her separate use, or for her separate property*," she can exercise the statutory powers as if she were a *feme sole* ; but if she is not entitled for her separate use or for her separate property, her husband must join with her in the exercise of the powers.

The concurrence of the husband can only be required when the marriage took place before the 1st January, 1883, and the married woman's title to the property has accrued before that date. In all other cases she can act alone. It is to be observed that under this Act when property is vested in trustees upon trust to pay the rents and profits to a married woman during her life for her separate use, she can, without the concurrence of the trustees, convey the legal estates to the purchaser (*q*). A restraint on anticipation does not prevent the exercise of the powers, but it will attach to the purchase-money, and to any investment thereof (*r*).

- | | |
|---|---|
| <p>(<i>l</i>) <i>Goodchild v. Dougal</i>, 3 Ch. D. 650.</p> <p>(<i>m</i>) 45 & 46 Vict. c. 38.</p> <p>(<i>n</i>) As to the persons who "have the powers of a tenant for life"</p> | <p>under the Act, see sect. 58.</p> <p>(<i>o</i>) Sect. 3.</p> <p>(<i>p</i>) Sects. 6—9.</p> <p>(<i>q</i>) See sect. 20.</p> <p>(<i>r</i>) Sects. 22 (5), 24.</p> |
|---|---|

Chap. I. s. 7.

Agricultural
Holdings
Act, 1883.

The Agricultural Holdings Act, 1883 (s), which contains various provisions as to the consent of landlords to improvements by tenants, and as to agreements for compensation, contains the following enactment with reference to women married before the commencement of the Married Women's Property Act, 1882 (t).

"A woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall, for the purposes of this Act be in respect of land as if she was unmarried."

"Where any other woman married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite, and she shall be examined apart from him by the County Court, or by the judge of the County Court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily."

(s) 46 & 47 Vict. c. 61.

(t) Sect. 26.

CHAPTER II.

LIABILITIES ARISING FROM THE MARRIAGE.

SECTION I.

LIABILITY OF THE HUSBAND AND THE WIFE FOR THE ANTE-
NUPTIAL OBLIGATIONS OF THE WIFE.

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1. <i>Liability of the Husband apart from Statute . . .</i>	72	5. <i>The Married Women's Property Act, 1874. Liability of the Husband for such Debts restored; Liability for the Wife's ante-nuptial Torts and Breaches of Contract limited to Assets received</i>	74
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4. <i>The Married Women's Property Act, 1870. The Husband released from Liability for Wife's Ante-nuptial Debts—The Wife rendered liable.</i>	73	8. <i>Mode of Proceeding to enforce Liability</i>	78

THE law on this subject has, for the present, been rendered somewhat complicated by the successive changes introduced by the recent Acts; and, as the liability of the husband is determined by the date of the marriage, (none of the Acts being retrospective in this particular), it becomes necessary to consider briefly the various phases through which the law has passed. The liability of the husband in respect of his wife's ante-nuptial obligations must be considered with reference not only to her debts, but also to her contracts and torts.

Chap. II. s. 1.

Liability of
husband apart
from statute.

Under the old law, *i. e.* in the case of marriages contracted before the 9th August, 1870, the husband, on his marriage, became liable for his wife's debts incurred before marriage of whatever amount, and whether he had any fortune with her or not. In the words of Blackstone "he adopted his wife and her circumstances together" (*a*).

This liability, however, terminated with the coverture, and after the death of the wife no action could be brought against the husband; unless, indeed, he was her personal representative, in which capacity he would have been liable so far as he had assets (*b*).

The husband was likewise liable in respect of the contracts of his wife entered into, and torts and breaches of trust committed by her before the marriage.

In *Palmer v. Wakefield* (*c*), where a woman when sole had committed a breach of trust, and the question was whether her after-taken husband should make good the loss sustained by the trust estate, Lord Langdale said, "In this situation she married Mr. Wakefield, and it was by the marriage and by his assuming the liabilities to which *she* was subject, that he also, as I think, became liable to pay the money."

Wife not
absolutely
released from
liability.

The effect of marriage was to charge the husband with the wife's prior debts, but it did not act as an absolute release to the wife; for, in the case of the bankruptcy of the husband, although his bankruptcy and discharge released both husband and wife from their personal liability at law, the separate property of the wife remained liable in equity to satisfy these debts: and in the case of the death of the husband the liability of the wife again revived (*d*).

(*a*) Bk. 1, c. 15, p. 443.

(*b*) *Thomond v. Suffolk*, 1 P. Wms. 461; *Heard v. Stamford*, 3 P. Wms. 409; *Bell v. Stocker*, 10 Q. B. D. 129.

(*c*) 3 Beav. 227; and see *Wainford v. Heyl*, L. R., 20 Eq. 321.

(*d*) *Chubb v. Stretch*, L. R., 9 Eq. 555; *Mitchison v. Hewson*, 7 T. R.

348; *Woodman v. Chapman*, 1 Camp. 189. The husband's liability, however, as it originated in the marriage, ceased with it; so that if the obligation were not enforced in the lifetime of the wife, the surviving husband could not be charged either at law or in equity, should he have had ever so large a fortune with

It was necessary, in order to charge the husband with the wife's prior debt, to prove the marriage. But strict evidence was not required where the fact of marriage was not in dispute. Thus, in an action against husband and wife, on the promissory note of the wife made *dum sola*, a witness stated that he knew her formerly, and had heard that she had afterwards married E. F. This was held sufficient *prima facie* evidence of marriage (e).

Chap. II. s. 1.
Evidence re-
quired to
charge the
husband.

In cases to which the Act of 1870 applies, *i. e.*, where the marriage took place between the 9th August, 1870, and the 29th July, 1874, both days inclusive, the husband's liability for his wife's ante-nuptial debts has been abolished, and the remedy of the creditor is confined to the separate property of the wife. By the 12th section it is enacted that:—

Act of 1870.

The husband
released from
liability.

The wife ren-
dered liable.

"A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried" (f).

It was held in *Ex parte Jones* (g) that the words in this section "liable to be sued" mean liable to be sued as in equity for the purpose of attaching the separate estate. It was there laid down that a debtor must be a person who can be sued personally for a debt, and who is liable to all the consequences of a personal judgment against him; but that the position of a married woman, even though she had separate estate, was different; for proceedings could not be taken against her personally to enforce payment of a debt.

Meaning of
"liable to be
sued for."

It was decided in *Sanger v. Sanger* (h) that, notwithstanding a restraint on anticipation annexed to an annuity, a charging

Even though
restrained
from anticipa-
tion.

her. This, however, applied only to property falling under his marital right, and not to his wife's choses in action, which he took at her death as her administrator.

(e) *Evans v. Morgan*, 2 Crompt. & Jer. 453.

(f) 33 & 34 Vict. c. 93, s. 12.

(g) 12 Ch. D. 490.

(h) L. R., 11 Eq. 470. It is doubtful whether this case can be supported, having regard to the decisions in *Robinson v. Wheelwright*, 6 De G., M. & G. 535; *Stanley v. Stanley*, 7 Ch. D. 589; and see *The Conveyancing Act*, 1881, s. 39.

Chap. II. s. 1. order obtained by creditors under this section constituted a valid incumbrance on the fund. A distinction may possibly be drawn between cases in which the restraint is imposed by a stranger, and those in which the wife, on her marriage, attaches a restraint on anticipation to her own property; the effect of which might be to withdraw from her creditors the only fund available for the satisfaction of their claims (*i*).

Under this section a married woman is liable to be sued for such debts as if she had continued unmarried, and, therefore, the husband need not be joined as defendant with his wife in an action brought for such debts, and execution may issue against her as if she were an unmarried woman (*k*).

Act of 1874.
Liability of
the husband
partially
restored.

It was obviously unjust to the creditors of the wife before marriage that the husband, however large a fortune he might have acquired with his wife, should escape from all liability in respect of her ante-nuptial engagements. To remedy this state of things, the Act of 1874 was passed. This Act left the liability of the separate property of the wife for her ante-nuptial debts unaffected (*l*), and it repealed, as to marriages after the 29th July, 1874, so much of the earlier Act as enacted that a husband should not be liable for the debts of his wife contracted before marriage, and provided that a husband and wife married after the passing of the Act might be jointly sued for any such debt (*m*).

In any such action the husband was liable to the extent only of certain assets specified in the Act.

The husband
liable for the
wife's torts
and breaches
of contract to
extent of
assets re-
ceived.

The Act of 1870 had released the husband from all present liability for his wife's ante-nuptial debts, but left him liable, to the full extent to which he was liable by the common law, for the torts and breaches of contract of the wife committed before marriage (*n*). This liability of the husband was again altered by the Act of 1874, and he was by that statute rendered liable

(*i*) *London and Provincial Bank v. Bogle*, 7 Ch. D. 773. See *Chubb v. Stretch*, L. R., 9 Eq. 555, and *The Married Women's Property Act*, 1882, s. 19.

(*k*) *Williams v. Mercier*, 9 Q. B. D.

337.

(*l*) 37 & 38 Vict. c. 50. This Act came into operation on the 30th July, 1874.

(*m*) *Ibid.* sect. 1.

(*n*) Sect. 2.

for the ante-nuptial torts, breaches of contract and debts of the wife to the extent only of the assets of the wife therein mentioned; for it was enacted that:—

“The husband shall in . . . any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified” (o).

It was not the duty of the plaintiff to allege that the husband had received assets, but it was for the husband to deny that he had (p).

These assets consisted of property of the wife acquired by the husband, either *jure mariti*, or by ante-nuptial gift, including personal estate in possession, choses in action, chattels real, and the rents and profits of real estate; and also any property, real or personal, which the wife, with the consent of her intended husband, had transferred to any person with the view of defeating or delaying her existing creditors.

The same section provides that any payment made by the husband, and any judgment recovered against him under the Act, are to be taken into account in estimating his liability in any subsequent action (q).

It was also provided by this Act, that if the husband was not liable in respect of any such assets, he should have judgment for his costs of defence, whatever the result of the action might be against the wife (r), and that if he was liable, the judgment should be a joint judgment against husband and wife to the extent of the husband's liability, and a separate judgment against the wife for the residue of the debt or damages (s). In the case of an action against the husband and wife jointly, where the husband is found not liable in respect of any such assets as are mentioned in the Act, the plaintiff will be allowed to add the costs of the husband's defence to his own, and recover both against the wife. Thus, in *London and Provincial*

Property
constituting
assets.

*London & Pro-
vincial Bank
v. Bogle.*

(o) See, however, *Conlon v. Moore*, Ir. R., 9 C. L. 190.

(p) 37 & 38 Vict. c. 50, s. 5; *Matthews v. Whittle*, 13 Ch. D. 811.

(q) *Fear v. Castle*, 8 Q. B. D. 380.

(r) *Ibid.* sect. 3.

(s) *Ibid.* sect. 4.

Chap. II. s. 1. *Bank v. Bogle* (*t*), the husband, in an action by the bank against himself and his wife for debts contracted previously to marriage, pleaded that he had not, and never had, at the time or since his marriage any assets in respect of which he was liable for such debts of his wife. Judgment was entered for him with costs, but against his wife; and the bank were held entitled to add his costs to their original debt, and recover the whole against the separate estate of the wife.

Under these provisions it has also been held that an Englishman married in England to a woman who had contracted debts in a foreign country where she resided prior to the marriage, is liable in England only to the extent of assets derived from his wife (*u*).

But the liability of the husband under this statute (*x*), subsisted only during the coverture, for the Act (*y*) rendered it necessary that the husband and wife be sued jointly, and gave no power to sue the husband alone. Consequently the husband's liability ceased upon his wife's death, as no action would lie against him alone.

Act of 1882.

Although the Act of 1874 is repealed by that of 1882, the liabilities of a husband married between the 29th July, 1874, and the 1st January, 1883, are not affected by such repeal (*z*). The principal provisions, indeed, of the earlier Act are re-enacted, and a husband is still rendered liable for his wife's ante-nuptial debts, contracts and wrongs in the same manner, though not to the same extent, as under the Act of 1874.

Extent of
liability of
the husband.

The property of the husband which can be made available to meet this liability is less than formerly, for the greater part of the assets which he formerly acquired by the marriage has now ceased to devolve upon him, and the only property which he can so acquire or become entitled to during the marriage will henceforward be whatever he may take by gift or settlement. This will, therefore, for the future be the extent of his liability. Under this statute the husband may be sued alone, and therefore the

(*t*) 7 Ch. D. 773.

(*u*) *De Greuchy v. Wills and Wife*,
4 C. P. D. 362.

(*x*) Married Women's Property
Act, 1874, 37 & 38 Vict. c. 50.

(*y*) Ibid. sect. 1.

(*z*) 45 & 46 Vict. c. 75, s. 14.

death of his wife will not prevent an action being brought against him alone in respect of her ante-nuptial liabilities, and if he has received assets from her he will be liable to the extent of those assets (a). Chap. II. s. 1.

As regards a woman married on or after the 1st January, 1883, she is, by the 13th section of the Act of 1882, liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into, or wrongs committed by her before marriage, including any sums for which she may be liable as a contributory under the Joint Stock Companies Acts; and she may be sued for any such debt, and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property, and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts or wrongs, and for all damages or costs recovered in respect thereof (b). The wife liable.

There is one class of liabilities which is mentioned for the first time in the Act of 1882, *i.e.*, those to which a married woman is subject under the Acts relating to joint stock companies. Under the old law, if a female contributory married, her husband was, during the marriage, liable to be placed on the list of contributories (c); but if shares in a joint stock company were applied for and registered in the name of a married woman, different considerations arose. For if it appeared that such a contract had been entered into upon the credit of her separate estate, and if the constitution of the company did not preclude married women from being shareholders, she might be placed on the list of contributories in her own right (d). Where the contract was not such as to impose a liability on the wife, and, in fact, to make the shares her Liability in respect of shares in joint stock companies.

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|--|---|
| <p>(a) <i>Secus</i> under the Act of 1874;
 <i>Bell v. Stocker</i>, 10 Q. B. D. 129.</p> | <p>(d) <i>Mrs. Matthewman's case</i>, L. R., 3 Eq. 781; see also <i>London, Bombay and Mediterranean Bank</i>, 18 Ch. D. 581.</p> |
| <p>(b) Sect. 13.</p> | |
| <p>(c) Companies Act, 1862, s. 78.</p> | |

Chap. II. s. 1. separate property, her husband was liable; and it was held (e), that his liability was not limited by the 5th section of the Married Women's Property Act, 1874, to the interest acquired by him in right of his wife, but that he was liable under the 78th section of the Companies Act, 1862, as a contributory in his own right to the assets of a company which was being wound up, and in which his wife held shares at the time of her marriage, even though held or settled to her separate use (f).

This class of contracts is now by the Act of 1882 (g) placed on the same footing as other contracts; and a married woman's separate property will be alone liable to satisfy such liabilities.

Against whom
proceedings
may be taken.

The effect of this legislation is, that in the case of marriages contracted after the 31st of December, 1882, a person suing in respect of any liability incurred by a married woman before marriage may pursue one or other of three remedies. He may proceed by an action (1) against the husband separately; (2) against the wife separately; or (3) against the husband and wife jointly.

Whichever proceeding he may adopt, his remedy may be prejudiced by circumstances, of which he is probably ignorant at the time of bringing his action. If he elect to sue the wife alone, judgment can be enforced only against her separate property, if any; if, on the contrary, he proceed against the husband alone, the liability of the latter is limited to the extent of the property "belonging to his wife which he shall have acquired or become entitled to from or through his wife after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law in respect of any such debts, contracts or wrongs" (h). If he proceed against both husband and wife jointly, he can recover against both husband and wife to the extent of the property which has been already mentioned; but if in any such action, or in any action against the husband alone, it is not found that the husband is liable in respect of any such property of the wife, the plaintiff is bound to pay to the

(e) *Ex parte Hatcher*, 12 Ch. D. Cas. 547.
284.

(g) Sect. 7.

(f) See also *Bell's Case*, 4 App.

(h) 45 & 46 Vict. c. 75, s. 14.

husband his costs of defence, whatever may be the result of the action against the wife jointly sued with him (i). The creditor, however, is entitled as against the wife to add these costs to his debt (k). Chap. II. s. 1.

SECTION II.

LIABILITY OF THE HUSBAND AND THE WIFE TO MAINTAIN EACH OTHER.

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2. <i>Can be directly enforced by the Parish only.</i>	79	4. <i>Liability to maintain Husband imposed on Wife by Statute</i>	80
3. <i>Indirect Methods whereby the</i>			

The marriage, (which under the old law conferred on the husband the control of his wife's person and estate), imposes on him also the duty of maintaining her; a duty which stands on a foundation of manifest justice; although the *direct methods* assigned by law to enforce it, have for their objects anything rather than to vindicate the rights of injured married women. The only *legal* reason why a husband should support his wife is, that she may not become a burden on the parish. So long as that calamity is averted, the wife has no claim on her husband. And in fact she has no *direct* claim upon him under any circumstances whatever; for even in the case of positive starvation she can only come upon the parish for relief. And then the parish authorities will insist that the husband shall provide for her, when he is able, to the extent at least of sustaining life (l). If a husband fail in this respect, so that his wife becomes chargeable to any parish, the 5 Geo. 4, c. 83, s. 3, enacts, that "he shall be deemed an idle and disorderly person, and shall be

Extent of this obligation.

In a direct manner, can be enforced by the parish only.

(i) Ibid. s. 15. (l) *Rex v. Flintan*, 1 Barn. & Ad. 227; 31 & 32 Vict. c. 122, s. 33.
 (k) *London and Provincial Bank v. Bogle*, 7 Ch. D. 773.

Chap. II. s. 2. punishable with imprisonment and hard labour" (*m*). The cost of the wife's maintenance by the parish can be recovered from the husband; but he cannot be made to pay for her maintenance a sum greater than the amount of the relief granted to her by the guardians (*n*).

A husband whose wife has left him and committed adultery, is not answerable to the parish for maintaining her, although he himself has been guilty of adultery since her departure (*o*). If a wife is justified on account of ill-usage in leaving her husband's house, and refusing to return to it, he will be ordered to contribute to her support, notwithstanding that he may offer to receive her back and not to ill-use her (*p*).

Liability of the wife to maintain her husband.

There was till recently no correlative obligation on the part of the wife to support the husband, but the Act of 1870 (*q*) made a married woman in England or Ireland having separate property liable for the maintenance of her husband if he became chargeable to any union or parish to the same extent that a husband is liable for the maintenance of his wife. This provision was re-enacted almost *verbatim* in the Act of 1882 (*r*), so that now a husband and a wife with property are mutually liable for each other's support.

Indirect methods by which the wife can compel her husband to maintain her.

(*m*) But that which cannot be enforced by the wife as matter of *direct obligation*, is generally attained in another way. In a word, the wife, as her husband's agent, can bind him for necessities furnished to her by third parties.

(*n*) 31 & 32 Vict. c. 122, s. 33;

Dinning v. South Shields Union, 12 Q. B. D. 61.

(*o*) *Rex v. Flintan*, 1 B. & Ad. 227.

(*p*) *Thomas v. Alsop*, L. R., 5 Q. B. 151.

(*q*) 33 & 34 Vict. c. 93, s. 13.

(*r*) 45 & 46 Vict. c. 75.

SECTION III.

LIABILITY OF THE HUSBAND AND THE WIFE TO MAINTAIN
THEIR CHILDREN.

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3. 43 Eliz. c. 2	81	<i>maintain the Wife's prior</i>	
4. <i>Liability imposed on the Wife</i>		<i>Children</i>	83
<i>by Act of 1870</i>	82	7. <i>No similar Liability on the</i>	
		<i>Wife</i>	83

A father is bound to maintain his children according to his ability, so as to prevent them from becoming chargeable to the poor law, and to prevent himself from becoming liable to proceedings under the criminal law for neglect (*s*); but no similar liability was imposed upon the wife.

Chap. II. s. 3.

Liability of
the husband.Formerly no
liability on
the wife.

The law did "not throw on the mother the duty, the legal obligation of maintaining, educating or providing for her children" while her husband was alive (*t*).

The Poor Law Act of Elizabeth (*u*) enacted that—

43 Eliz. c. 2.

"The father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person, not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person."

But the liability thus imposed attached to the husband during his life, so that no liability attached to the wife during coverture, it being held that the words "mother and grandmother" must be read as if the description were "mother and grandmother not being under coverture" (*x*); and the House of Lords refused to order a married woman, who possessed separate property, and

(*s*) *Bazeley v. Forder*, L. R., 3 Q. B. 559; 24 & 25 Vict. c. 100, s. 27; 31 & 32 Vict. c. 122, s. 37; *R. v. Falkingham*, L. R., 1 C. C. R. 222.
(*t*) *Hodgens v. Hodgens*, 4 Cl. & Fin. 323, per Lord Brougham, at

p. 374.

(*u*) 43 Eliz. c. 2, s. 7.

(*x*) *Custodes v. Jinks*, Sty. 283; *Coleman v. The Overseers of Birmingham*, 6 Q. B. D. 615.

Chap. II. s. 3. who had eloped, to contribute to the maintenance of the children of the marriage, although the husband stated in his petition that his own means were not sufficient (z).

All relief given under the poor laws to any child under sixteen is to be considered as being given to the father, or, if he is dead, to the widow (a); and under the statutes relating to reformatory and industrial schools (b), the parent or other person liable for the maintenance of the child sent to such a school may be ordered to contribute to its maintenance there. Prior, therefore, to the Act of 1870, there was no liability on a married woman to support her children while her husband was alive.

The Act of 1870 imposed on a woman possessing property the same liability as a widow to maintain her children, but not her grandchildren.

The Married Women's Property Act, 1870 (c), enacted that—

“A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children: provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children.”

This section did not make a woman whose husband was alive liable to contribute to the support of her *grandchildren*, even though she had separate estate.

The Act of 1882 makes her as liable as her husband to maintain both children and grandchildren, but does not relieve him of his liability.

The liability of the wife has however been extended by the Married Women's Property Act, 1882 (d), which enacts, in sect. 21, that—

“A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children and grandchildren.”

A married woman having separate property is therefore now liable as well as her husband for the maintenance of her children and grandchildren. But the husband is not relieved from his liability; so that, unless it can be considered that the husband and wife are now concurrently liable, the husband still remains primarily liable, and recourse cannot be

(z) *Hodgens v. Hodgens*, 4 Cl. & Fin. 323.

(a) 4 & 5 Will. 4, c. 76, s. 56.

(b) 29 & 30 Vict. c. 117, s. 25, c. 118, s. 39.

(c) 33 & 34 Vict. c. 93, s. 14.

(d) 45 & 46 Vict. c. 75, s. 21.

had to the wife's property until and unless he is unable to maintain the children. It would seem that a married woman having separate property, who has been deserted by her husband, will now be liable to conviction under the Vagrancy Act, 5 Geo. 4, c. 83, s. 4, if she runs away and leaves her children chargeable to the parish (e). Chap. II. s. 3.

A parent is not bound by law to pay the debts of his children unless he has impliedly or expressly given the child authority to incur them (f).

Another consequence of the marriage is, that the husband becomes bound to maintain, *as part of his family*, any child or children, till the age of sixteen, legitimate or illegitimate, whom his wife may have at the time of entering into the contract. This obligation was imposed by the 4 & 5 Will. 4, c. 76, s. 57 (g), and has not been restricted by subsequent legislation. Husband liable to maintain his wife's prior children.

There is no obligation on the part of the wife to maintain her husband's children by a former marriage.

(e) Conf. *Peters v. Cowie*, 2 Q. B. D. 131, 136. P. 1; *Mortimore v. Wright*, 6 M. & W. 482.

(f) *Law v. Wilkin*, 6 Ad. & El. 718; *Blackburn v. Mackey*, 1 C. & (g) *Re Wendron*, 7 Ad. & Ell. 819.

CHAPTER III.

LIABILITIES ARISING FROM ACTS DONE IN THE MARRIAGE STATE.

SECTION I.

LIABILITY OF THE WIFE FOR CRIMINAL OFFENCES.

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2. <i>Not liable if acting under coercion of her Husband</i> .	84	<i>if deserting her Husband</i> .	86
3. <i>Distinction between Felonies and Misdemeanors</i> . . .	85	6. <i>Incompetency of Husband and Wife to give Evidence for or against each other in Criminal Proceedings</i> . . .	86
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5. <i>Paramour may be convicted of Larceny of Husband's</i> .		8. <i>Their competency to do so under the Act of 1882</i> .	88

Chap. III. s. 1. FORMERLY a wife could not, while under coverture, contract civil liability unless she possessed separate estate; but crimes committed by her were always personal to herself, and for criminal offences she is liable to be punished as if she were a *feme sole*. But this statement must be understood as referring to offences committed by her alone, that is to say, apart from her husband, for the presumption of law is, that when a felonious act is committed by a wife in the presence of her husband, it is done under his coercion and control, and she is excused from punishment; but this presumption may be rebutted by evidence, and if it appear that the wife was principally instrumental in the commission of the crime, that she acted voluntarily and not by restraint of her husband even though he was present, she will be liable to punishment (*a*).

The wife
liable for her
crimes.

Unless under
her husband's
coercion.

(*a*) 1 Hale, 516; *R. v. Cohen*, 11 Cox, 99; *R. v. Smith*, 1 Dea. & B. C. C. 553.

If a husband and wife are jointly indicted for receiving stolen goods, it has been held that the wife cannot be convicted, unless the jury have been asked whether she received the goods in the absence of her husband (*b*). Chap. III. s. 1.

The acquittal of a wife who was indicted with her husband for a misdemeanor for uttering counterfeit coin, was directed in one case on the ground that the distinction between the effect of coercion in felonies and misdemeanors did not exist (*c*), but in a subsequent case, before the twelve judges, the Court was of opinion that the point as to a coercion of a wife by her husband did not arise, as the result of the case was a conviction for misdemeanor (*d*). Distinction between felony and misdemeanor.

A wife is not answerable for a husband's neglect to provide food for an apprentice (*e*).

In Hale's Pleas of the Crown (vol. 1, pp. 45, 47) it is laid down that when a crime is committed by husband and wife jointly, the presumption of law is, that the wife is acting under the coercion of her husband except in cases of *treason* and *murder*. In a later part of his work (pp. 434, 516) he makes an additional exception in the case of *manslaughter*. Serjeant Hawkins (*f*) states the only three exceptions to be *treason*, *murder* and *robbery*, and these in Russell on Crimes are stated to be the exceptions (*g*). Mr. Greaves, however (one of our highest authorities on criminal law), in a note on this passage in Russell, says, "I can find no *decision* which warrants the position in the text as to treason, murder or robbery;" and Mr. Justice Stephen says that the principle does not apply to high treason or murder, and probably not to robbery. Except in certain cases.

A wife may be indicted jointly with her husband for keeping a brothel or gaming house (*h*), or for a forcible entry (*i*).

(*b*) *R. v. Archer*, 1 Mood. C. C. 143; *R. v. Wardroper*, 1 Bell, C. C. 249; 29 L. J. Rep., M. C. 116.

(*c*) *R. v. Price*, 8 C. & P. 19.

(*d*) *R. v. Cruse*, 8 C. & P. 541; *R. v. Ingram*, 1 Salk. 384. See also Stephen's Digest of the Criminal Law, 17.

(*e*) *Rex v. Squire*, Stafford Lent Assizes, 1799, MS., cited in note to

Russell on Crimes, 5th ed., vol. 1, p. 144.

(*f*) Hawkins' Pleas of the Crown, vol. 1, p. 4, 8th ed. See, however, editorial note on the third exception.

(*g*) 5th ed., vol. 1, p. 139.

(*h*) *Reg. v. Dixon*, 10 Mod. 335; *Reg. v. Williams*, 1 Salk. 384.

(*i*) 1 Hale, 21; 1 Hawk. c. 64, s. 35. The subject of the wife's

Chap. III. s. 1.

How far the
presumption
extends.

It may be gathered from a review of the above authorities, that at present it is not very clear how far the *prima facie* presumption of law, as to the wife acting under the coercion of her husband, extends, although it seems to be generally assumed that it is excluded in cases of treason and murder, as well as in cases of misdemeanor (*k*).

Presumption
of coercion
may be re-
butted.

The presumption of coercion may also be rebutted by showing that the husband was bed-ridden or a cripple at the time of the offence being committed (*l*).

Paramour
may be con-
victed of
larceny.

Where a wife elopes, and she and her paramour jointly carry off the husband's property, the paramour could always be convicted of larceny, provided that there was also evidence of adulterous intercourse between the parties (*m*).

Under the
Act of 1882
husband
and wife may
be prosecuted
for taking
each other's
goods in cer-
tain cases.

Under the Married Women's Property Act, 1882, a wife who wrongfully takes away property of her husband when leaving or deserting, or about to leave or desert him, is made liable to criminal proceedings by her husband; so that if property belonging to the husband is taken by the wife, or with her consent or privity, when she is deserting him, she will now be liable to prosecution; for in the circumstances specified in these sections a husband and wife are made liable to criminal proceedings by each other (*n*); and, consequently, a person who receives such property of a husband or wife so illegally dealt with by either, will not now be protected against criminal proceedings (*o*).

Husbands and
wives for-
merly incom-
petent to give
evidence for
or against
each other.

At common law husbands and wives were incapable of giving evidence for or against each other in either civil or criminal proceedings; but the result of various statutes is, that now in any civil proceeding the husbands and wives of the parties thereto, and of the persons in whose behalf any such proceeding is brought, instituted, opposed or defended, are competent and compellable to give evidence (*p*) on behalf of either or any of

criminal responsibility will be found fully treated in Russell on Crimes, 5th ed., vol. 1, p. 139 *et seq.*

(*k*) *R. v. Cruse*, 8 C. & P. 541; *R. v. Torpey*, 12 Cox, C. C. 45, at p. 48.

(*l*) *R. v. Cruse*, 2 Moo. C. C. 53, at p. 57.

(*m*) *R. v. Berry*, 28 L. J., M. C. 70; *R. v. Avery*, *ib.* 185.

(*n*) Sects. 12, 16.

(*o*) See *R. v. Kenny*, 2 Q. B. D. 307.

(*p*) 16 & 17 Vict. c. 83; 32 & 33 Vict. c. 68.

the parties to the proceeding: communications made to each other during marriage being privileged (*q*). The old rule, however, is still in force in criminal cases (*r*), for the statute which altered the law as to the competency of husbands and wives to give evidence for and against each other, expressly provided that nothing in it should render husbands or wives competent or compellable to give evidence for or against each other in any criminal proceeding (*s*); and where two prisoners are indicted and tried together, the wife of one cannot be a witness for or against the other (*t*); if, however, one of the two pleads guilty, then his wife is a competent witness against the other, as the evidence no longer affects her husband (*u*). But the evidence of a husband or wife is admissible in cases the result of which may tend to subject one or the other to a criminal charge (*x*), though in such a case it is probable that the witness would not be compelled to give evidence.

Chap. III. s. 1.
Incompetency
abolished in
civil pro-
ceedings.

There is one main exception to this general principle: in any criminal proceeding against a husband or a wife for a crime committed by the one against the other affecting the liberty or person of the other, the husband or wife is a competent witness, as, for instance, in cases of abduction, assault and bodily injury (*y*). But a wife cannot give evidence against her husband on a charge of deserting her under the Vagrant Acts (*z*). There are also not a few statutory exceptions to this common law rule, such as those enacted in the Licensing Act, 1872 (*a*); in the Sale of Food and Drugs Act, 1875 (*b*); in the Conspiracy and Property Protection Act, 1875 (*c*); in 40 & 41 Vict. c. 14, where an indictment is tried for the purpose of

Exception to
the rule in
cases affecting
liberty or the
person.

Statutory
exceptions in
criminal pro-
ceedings.

(*q*) 16 & 17 Vict. c. 83, s. 3.

(*r*) *R. v. Payne*, L. R., 1 C. C. R. 349.

(*s*) 16 & 17 Vict. c. 83, s. 2.

(*t*) *R. v. Thompson*, L. R., 1 C. C. R. 377; 41 L. J., M. C. 112.

(*u*) *R. v. Thompson*, L. R., 1 C. C. R. 377.

(*x*) *R. v. Halliday*, 29 L. J., M. C. 148; *R. v. Bathwick*, 2 B. & Ad. 639;

R. v. All Saints, Worcester, 6 M. &

S. 194.

(*y*) *Reeve v. Wood*, 5 B. & S. 364; 34 L. J., M. C. 15; *Lord Audley's case*, 3 Ho. St. Tri. 402, 413.

(*z*) 5 Geo. IV. c. 83, s. 3.

(*a*) 35 & 36 Vict. c. 94, s. 51, subs. 4.

(*b*) 38 & 39 Vict. c. 63, s. 21.

(*c*) 38 & 39 Vict. c. 86, ss. 4, 5, 6, 11.

Chap. III. s. 1. enforcing a civil right only; in the Army Act, 1881 (*d*), and in the Explosives Act, 1883 (*e*): for by all these statutes husbands and wives are made competent witnesses for or against each other for the purposes of those Acts.

In cases of high treason, it has been suggested that the evidence of a wife would be received against her husband; but Mr. Taylor, in his work on Evidence, does not favour this view (*f*).

Act of 1882,
ss. 12, 16.

The Married Women's Property Act, 1882 (*g*), provides by sect. 12, that—

“Every woman whether married before or after this act shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if such property belonged to her as a feme sole; but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this act while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife.”

And by sect. 16, that—

“A wife doing any act with respect to any property of her husband, which if done by the husband with respect to property of the wife would make the husband liable to criminal proceedings by the wife under this act, shall, in like manner, be liable to criminal proceedings by her husband” (*g*).

Husbands and
wives com-
petent to give
evidence
against each
other in cases
arising under
section 12.

Section 12 deals with both civil and criminal proceedings: its main provisions are directed to those cases in which the wife will be the plaintiff or prosecutrix, and the section then enacts that in “any proceeding under this section a husband or wife

(*d*) 44 & 45 Vict. c. 58, s. 156,
sub-s. 3.

(*e*) 46 & 47 Vict. c. 3, s. 4, sub-s. 2.

(*f*) See Taylor on Evidence, vol.
ii. (ed. 7), 1152, s. 1372.

(*g*) 45 & 46 Vict. c. 75, ss. 12, 16.

shall be competent to give evidence against each other." Sect. 16 Chap. III. s. 1. only deals with criminal proceedings taken by the husband against the wife. It has been decided (*h*) that the power given to husbands and wives to give evidence against each other, is only given with reference to cases which arise under sect. 12, and, therefore, that although a wife can give evidence against her husband in criminal proceedings taken by her against him under that section, yet that a husband cannot give evidence against his wife when he takes criminal proceedings against her pursuant to the provisions of sect. 16.

What constitutes desertion has been much considered in connection with proceedings under the Acts constituting the Court for Matrimonial Causes, and the cases decided on those statutes are discussed in the chapter devoted to that subject (*i*). The question has also arisen in cases connected with the administration of the poor law, where a husband, who ordered his wife to leave his house in consequence of her adultery, was considered to have deserted her within 24 & 25 Vict. c. 55, s. 3 (*j*), while it was held that there was no such desertion where the wife departed from the home of her own free will (*k*); but there seems no reason to suppose that the word "deserting" is used in this section in any particular technical sense.

Meaning of
deserting or
leaving.

(*h*) *R. v. Brittleton*, 12 Q. B. D. 266. A Bill is now pending before Parliament to remedy this omission.

(*i*) See *post*, Chap. VIII.

(*j*) *Reg. v. Maidstone Union*, 5 Q. B. D. 31.

(*k*) *R. v. Cookham Union*, 9 Q. B. D. 522.

SECTION II.

LIABILITY FOR TORTS OF THE WIFE.

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Chap. III. s. 2.

The husband formerly liable during coverture for wife's torts.

Where the act of the wife without being positively criminal was yet illegal, where, for instance, she committed a fraud, or published a libel, her husband was formerly liable at law; for a married woman could not, strictly speaking, commit torts while under coverture: they were the torts of her husband and he was liable (l). This liability was based upon a principle of necessity as well as justice, for as the wife could not be sued alone, the person injured by her would, if the husband had been free from liability, have been left without redress. It was, therefore, necessary to sue the husband and wife jointly (m), and he remained liable as long as the coverture existed, even though they were living apart (n), unless it were established that the wife was living in adultery, or that a decree of divorce (o) or judicial separation had been pronounced, or unless she had obtained a protection order under 20 & 21 Vict. c. 85.

Exceptions.

His liability ceased on the termination of coverture.

On the death of the wife, or the dissolution of the marriage, the husband ceased to be liable for torts committed by the wife alone during the coverture, unless they were committed by her as his agent, and it would seem that if the wife survived her husband, she was held liable for such torts, unless redress had

(l) *Wainford v. Heyl*, L. R., 20 Eq. 321.

(m) *Catterall v. Kenyon*, 3 Q. B. 310; *Keyworth v. Hill*, 3 B. & Ald. 685.

(n) *Head v. Briscoe*, 5 C. & P. 484.

(o) *Capel v. Powell*, 17 C. B., N. S. 743.

already been had (*p*). A husband is and always was responsible for a fraud committed by his wife as his agent, on the general rule that a principal is answerable for the fraud of his agent acting within the scope of his authority for the benefit of the principal (*q*), and it makes, of course, no difference that the agent happens to be the wife of the principal; so that a tradesman who, being desirous of selling a business, allowed his wife to give information as to the profits of the business, was held liable for fraudulent representations made by her to a purchaser (*r*).

Chap. III. s. 2.

Husband's liability for torts of wife acting as his agent.

The provisions of the Married Women's Property Acts do not interfere with the principles of the law of agency; they do, however, remove difficulties which arose in cases where a married woman made a fraudulent representation in connection with a contract, for it was held that no action would lie against a husband and wife for a fraudulent representation made by the wife that she was a *feme sole*, by which she induced the plaintiffs to advance money to a third person and to accept her as surety, because the fraud was directly connected with the contract made with the wife (*s*). Where a married woman falsely represented that the signature to a bill of exchange was that of her husband, the Court was equally divided in opinion on the question whether an action could be maintained (*t*). Now, however, a married woman who commits a fraud in connection with a contract, or who obtains credit by false representations, will be liable to the extent of her separate property.

Not liable formerly for fraud of wife connected with a contract.

Wife now liable.

Under the old law, that is, prior to the 1st January, 1883, the husband was held answerable for his wife's breaches of trust, devastavits, or other wrongful acts done by her as trustee, executrix or administratrix, on the ground that these were offices which she could assume only with his sanction and approbation. This liability, however, ceased with the termination of the coverture,

Wife liable for breaches of trust and devastavits.

(*p*) *Vine v. Saunders*, 4 Bing. N. C. 96.

(*r*) *Taylor v. Green*, 8 C. & P. 316.

(*q*) *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; *Barwick v. Joint Stock Bank*, L. R., 2 Ex. 259; 36 L. J., Ex. 147.

(*s*) *The Liverpool Adelphi Loan Association v. Fairhurst*, 9 Ex. 422.

(*t*) *Wright v. Leonard*, 11 C. B., N. S. 258.

Chap. III. s. 2. except as to assets he might have received (*u*), and has been entirely taken away by the Married Women's Property Act, 1882. By this Act, married women are rendered liable for any breach of trust or devastavit committed either before or after marriage, and the husband is declared to be not subject to any liability, unless he has acted or intermeddled in the trust or administration (*x*).

Husband and wife now both liable for her general torts.

The Married Women's Property Act, 1882, does not specifically abolish the liability of a husband for torts committed by his wife during coverture; but it enables the wife to be sued alone for her torts (*y*), in which case any damages or costs recovered against her will be payable out of her separate property, and not otherwise. It is therefore open to a plaintiff to sue the husband and the wife jointly, or to sue the wife alone. If he adopts the former course, he will, if successful, obtain a judgment, which can be enforced against the wife to the extent of her separate property, and should that be insufficient, against the husband; if he sues the wife alone, he will be able to enforce the judgment against her alone to the extent of her separate property.

Claims by or against husband and wife may be joined with claims by or against either of them separately, and if a husband and wife are both made defendants, they must both be served with the writ unless the Court or a judge shall otherwise order (*z*).

(*u*) Williams' Executors, 7th ed. p. 1838; *Smith v. Smith*, 21 Beav. 385; *Clough v. Bond*, 3 My. & Cr. 490; *Clifford v. Washington*, 48 L. J., Ch. 205.

(*x*) 45 & 46 Vict. c. 75, s. 1, sub-s. 4, and s. 24.

(*y*) *Ibid.* s. 1, sub-s. 2. Rules of Court, 1883, Ord. XXXIV. r. 4.

(*z*) Rules of Court, 1883, Ord. XVIII. r. 4, and Ord. IX. r. 3.

SECTION III.

LIABILITY DURING COHABITATION FOR THE CONTRACTS OF
THE WIFE.

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The principle, as deduced from the leading case of *Manby v. Scott* (a), on which a husband is held liable for his wife's contracts, is that she is acting as his agent and with his authority.

In *Debenham v. Mellon* (b), the House of Lords approved of the judgment of the majority of the Court in *Jolly v. Rees* (c), and held that neither marriage nor cohabitation implies of itself a mandate in law making the wife, except in the case of necessity, the agent in law of the husband to bind him, and to pledge his credit. No doubt, as a rule, the ordinary state of cohabitation between husband and wife does carry with it some presumption and some *prima facie* evidence of an authority to manage certain departments of the household expenditure, and to pledge the credit of the husband in respect of matters coming

Wife the agent of husband.

Debenham v. Mellon.

As a rule, marriage affords *prima facie* evidence of authority.

(a) Smith's L. C., 8th ed., vol. 2, 445.

(b) 6 App. Cas. 24.

(c) 15 C. B., N. S. 628.

Chap. III. s. 3. within that department, regard being had to the situation in life and position in society of the husband. But this authority only relates to such things as ordinarily fall within the domestic department usually confided to the wife, and where the articles bought upon credit are necessaries of such a kind and character as persons in that class of life are in the habit of ordering upon credit (*d*). The presumption is not absolute, and may be rebutted by proof that the wife was supplied with necessaries (*e*), or with money to pay for such necessaries (*f*), or that the husband had forbidden his wife to pledge his credit (*g*); for otherwise the principles of agency, upon which the liability of the husband is based, would be practically of no effect (*h*). If a husband has so conducted himself as to make it inequitable for him to deny his wife's authority, if he has by prior mandate or subsequent ratification authorized his wife to pledge his credit, or if he has so conducted himself as to entitle persons dealing with her to believe that she had his authority so to act, then the authority or consent so expressly or impliedly given cannot be got rid of by a private arrangement between him and his wife not communicated to third parties affected by it (*i*).

This presumption may be rebutted.

Onus of proof is on party seeking to charge the husband.

The presumption if raised is strongest when the domestic manager is the wife; but it may also arise in the case of any other person placed in the position of manager of a domestic establishment (*k*). In all cases where, prior to the Married Women's Property Act, 1882 (*l*), a tradesman sued the husband for goods supplied to his wife, the burthen of proof was on the plaintiff to show that they were necessaries suited to the condition of the husband (*m*), that she was not supplied with them or with money by her husband, or that the wife made the contract with the knowledge and assent of the husband, or that he had expressed no disapproval of the purchase, and so ratified the

(*d*) *Phillipson v. Hayter*, L. R., 6 C. P. 38; *Etherington v. Parrott*, 1 Salk. 118; *Waithman v. Wakefield*, 1 Camp. 120.

(*e*) *Mizen v. Pick*, 3 M. & W. 481.

(*f*) *Reneaux v. Teakle*, 8 Ex. 680.

(*g*) *Debenham v. Mellon*, *supra*; *Jolly v. Rees*, *supra*.

(*h*) *Clifford v. Laton*, 3 C. & P. 15.

(*i*) *Drew v. Nunn*, 4 Q. B. D. 661.

(*k*) *Debenham v. Mellon*, *supra*.

(*l*) 45 & 46 Vict. c. 75.

(*m*) *Phillipson v. Hayter*, *supra*.

contract (n). And it would seem that even since that Act, if a tradesman sue the husband he must, in order to succeed, produce similar proof. Chap. III. s. 3.

If, since the Act of 1882, a tradesman were to sue the wife for such necessaries, on the ground that she entered into the contract, and that her property was therefore liable, the *onus* of displacing her liability is now thrown upon the wife. It is apprehended that evidence of the same kind, which formerly rendered a husband liable, will now displace the wife's liability, and will in effect show that the contract was not entered into by her with respect to her separate property.

The presumption of authority, however, may be rebutted by showing that the husband had given warning to the tradesman not to supply his wife with goods (o), or that he had forbidden her to pledge his credit, or that she was already sufficiently supplied with articles of the same character as those for the price of which he was sued, and which were supplied to her without his knowledge (p). But if he knew of the extra commodities supplied upon his wife's order, if his family had had the benefit of them, and if, in fact, he himself, in his own person, had helped to appropriate or consume them, none of the decisions or *dicta* imply that he would not be liable. On the contrary, it may be assumed that he would be bound in such a case, although he were to prove that his establishment was, by his own order, sufficiently and even amply supplied with all necessary articles (q). Even the extravagant nature of the order, although it *may* not be alone sufficient to rebut the presumption of her agency, yet may be properly left to the jury as evidence to negative the husband's authority (r). The proper question for the jury, even where the husband is living with his

How presumption may be rebutted.

(n) *Montague v. Benedict*, 3 B. & C. 631; 2 Sm. L. C., 8th ed., 483; *Lane v. Ironmonger*, 13 M. & W. 368.

(o) *Etherington v. Parrott*, 1 Salk. 118.

(p) *Renaux v. Teakle*, 8 Ex. 680.

(q) See 2 Rop. 112, where he says in a marginal note, "If the articles bought be not necessaries, yet if they come to the husband's

use, he will be liable." This is justice and good sense at all events; but he cites no decision or dictum. In his text at the same place he says the husband will be liable where "he allows the wife to retain and enjoy" the articles.

(r) *Lane v. Ironmonger*, 13 M. & W. 368; *Spreadbury v. Chapman*, 8 C. & P. 371.

Chap. III. s. 3. wife, is not merely whether the goods, in respect of which the action is brought, were necessities suitable to her station, but whether upon the facts proved she had any authority, express or implied, to bind her husband by the contract; and where the former question alone was put the Court granted a new trial (s).

As to what are necessities, a question for jury.

The question as to what are necessities is one for the jury, though it is for the judge to determine whether there is evidence that ought reasonably to satisfy a jury that the articles in question are necessities or not (t).

Definition of term "necessaries."

"The word necessities," says Byles, J., in *Jolly v. Rees* (u), "is not free from ambiguity. It may import simply things suitable to the station of the party, supplied without reference to the supply or means of supply from other sources; or it may import things not only suitable, but requisite or indispensable, because not supplied from any other source. And these last again are divisible into two classes: those which are indispensable without any fault of the party supplied, and those which are indispensable because the party supplied has wasted supplies, or the means of supply, from other quarters." From this definition given by the learned judge of the word "necessaries," it is obvious that the meaning to be attached to the term must depend upon the facts of each particular case.

When husband not liable.

A husband who supplies his wife with necessities suitable to her position is not liable for debts contracted by her without his previous authority or subsequent sanction (x). And where he has expressly forbidden her to contract debts, this prohibition will negative the inference that the husband had held out that the wife had authority to bind him (y).

Cases where wife has goods supplied during temporary absence of husband.

Where a husband is not separated from his wife, but during a temporary absence makes an allowance to her for the supply of herself and family with necessities, he is not liable to a tradesman who, with knowledge of this fact, supplies her with

(s) *Reid v. Teakle*, 13 C. B. 627.

(t) *Ryder v. Wombwell* (Ex. Ch.),

L. R., 4 Ex. 32.

(u) 15 C. B., N. S. 628.

(x) *Seaton v. Benedict*, 5 Bing. 28; 2 Sm. L. C., 8th ed., 491.

(y) *Jolly v. Rees*, 15 C. B., N. S. 628, approved in *Debenham v. Mellon*, 6 App. Cas. 24.

goods (s). Also, when a tradesman, knowing the wife to be a married woman, gave credit to her and not to the husband, it was held that the husband was not liable (a). Chap. III. s. 3.

Where the wife of an officer resides in England, and her husband is abroad on service, she is not to be considered as living separate from her husband (b).

It may perhaps be not out of place to observe here, that as a general rule it is the duty of a wife to reside with her husband wherever he wishes; and consequently, it has been held that a condition attached to a legacy, that the legatee (a married woman) should reside in a place different from that where her husband wished her to reside, is void (c). Wife bound to reside where husband wishes.

A man is liable for the debts of the woman with whom he cohabits, if he holds her out to the world as his wife (d). And where a man, who had for some years so cohabited with a woman who had passed as his wife, went abroad, it was held that she might have the same authority to bind him by her contracts for necessities as if she had been his wife, but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received (e). Such liability will continue even after the cohabitation has ceased, unless the parties supplying goods have been informed of the separation (f). Where woman held out as wife.

Necessaries have been held to include not only the means of living in accordance with the husband's position, but also the expenses of exhibiting articles of the peace against a husband who had violently threatened his wife (g); but expenses incurred in indioting a husband were not considered to be necessities (h). What are necessities.

(z) *Holt v. Brien*, 4 B. & Ald. 252.

(a) *Bentley v. Griffin*, 5 Taunt. 356.

(b) *Dennys v. Sargeant*, 6 Car. & P. 419.

(c) *Wilkinson v. Wilkinson*, L. R., 12 Eq. 604.

(d) *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Campb. 245.

(e) *Blades v. Free*, 9 B. & C. 167; *Smout v. Ilbery*, 10 M. & W. 1.

(f) *Ryan v. Sams*, 12 Q. B. 460; *Munro v. De Chemant*, 4 Campb. 215.

(g) *Shepherd v. Mackoul*, 3 Campb. 326; *Turner v. Rookes*, 10 Ad. & Ell. 47.

(h) *Grindell v. Godmond*, 5 Ad. & Ell. 755.

Chap. III. s. 3. Amongst necessities, the cost of which can be recovered from the husband, are expenses incidental to a suit for the restitution of conjugal rights, or for proceedings for a divorce or a judicial separation, where they are in fact necessary for the protection of the wife (*i*); but care must be taken that the suit is reasonably and rightly instituted (*k*). Where a decree is made upon a husband's petition for divorce, he must pay all the costs properly incurred by his wife in her defence (*l*). A solicitor employed by a wife to obtain a divorce may sue the husband for costs reasonably incurred beyond those allowed on taxation, for the common law right is not limited by the statutory right (*m*).

Act of 1882. The Married Women's Property Act, 1882, does not seem to have affected the liability of the husband for contracts made by his wife as his agent, or by his authority; but the Act has conferred upon a married woman the capacity of entering into and rendering herself liable on any contract to the extent of her separate property. It also provides that she may be sued on such contracts as a *feme sole*, that damages or costs recovered against her shall be payable out of her separate property (*n*), that every contract entered into by her shall be deemed to be entered into with respect to and to bind her separate property, unless the contrary be shown (*o*), and that such contracts shall bind all after-acquired separate property (*p*). The word "contract" includes trusts, and the offices of executrix and administratrix (*q*).

The separate estate of a married woman could always be rendered liable to answer her general engagements made with reference to that property (*r*); but it was necessary to show that she intended to contract so as to make herself, that is, her separate property, the debtor (*s*).

(*i*) *Brown v. Ackroyd*, 5 E. & B. 819; *Rice v. Shepherd*, 12 C. B., N. S. 332.

(*k*) *Re Hooper*, 33 L. J., Ch. 300; *Taylor v. Hailstone*, 52 L. J., Q. B. 101.

(*l*) *Robertson v. Robertson*, 51 L. J., P. D. & A. 5; and see *Smith v. Smith*, 51 L. J., P. D. & A. 31.

(*m*) *Ottaway v. Hamilton*, 3 C. P. D. 393; 47 L. J., C. P. 424; *Stocken*

v. Patrick, 29 L. T. 507.

(*n*) Sect. 1, sub-s. 2.

(*o*) Sub-s. 3.

(*p*) Sub-s. 4.

(*q*) Sect. 24.

(*r*) *Johnson v. Gallagher*, 3 D., F. & J. 494. See on this subject, *post*, Chap. XI. sect. 2.

(*s*) *London Chartered Bank v. Lemprière*, L. R., 4 P. C. 572, 597.

The changes effected by the Act of 1882 are important, for the *onus* is now on the married woman to displace the presumption that she intended in entering into a contract to bind her separate property; she can, of course, do so by showing that she entered into the contract as the agent or by the authority of her husband, express or implied; and if she has that authority, the fact that she has separate property cannot, it seems, relieve him from liability on contracts so made by her.

Chap. III. s. 3.

Onus under Act on wife to displace presumption that she intended to bind her separate property.

The property of a married woman liable to satisfy her contracts has been increased. Formerly she could not render after-acquired property liable (*t*); the Act of 1882, however, makes all property which may at any time belong to her liable for her contracts; but still no property which is subject to a restraint on anticipation can be reached (*u*), unless, under the Conveyancing Act, 1881 (*v*), the Court, where it appears to be for her benefit, by judgment or order, with her consent, binds her interest in any property; and the Court, as a general rule, will not make any such order except for the purpose of facilitating alienation as distinguished from anticipation.

Court can remove restraint on anticipation.

The separate property which is thus made liable will include all property held to the separate use of a married woman without restraint on anticipation, whether held for her by trustees or belonging to or acquired by her under the provisions of the Acts of 1870 and 1882; but judgment must be obtained against the property before she can be restrained from dealing with it (*x*). It will also include property appointed by her by will in execution of a general power (*y*): for although it was settled law, that where the power was to be exercised by deed or will the *corpus* of the property if appointed by will became subject to her debts and engagements, there was some doubt whether where the power was to be exercised by will alone the effect was the same (*z*); but now property, whether the power

What property will be bound.

(*t*) *Pike v. Fitzgibbon*, 17 Ch. D. 454; 50 L. J., Ch. 394.

(*x*) *Robinson v. Pickering*, 16 Ch. D. 660.

(*u*) *Re Warren's Settlement*, W. N. 1883, 125; and see *Hodges v. Hodges*, 20 Ch. D. 749.

(*y*) 45 & 46 Vict. c. 75, s. 4.

(*z*) *London Chartered Bank of Australia v. Lemprière*, 4 P. C. 572.

(*v*) 44 & 45 Vict. c. 41, s. 31.

Chap. III. s. 3. be to appoint by deed or will, or by will alone, is, if actually appointed by will, equally subject to all the engagements of a married woman.

Husband not liable on promissory note made by wife unless as his agent.

A husband is not liable on a promissory note made by his wife in his name without his authority; and evidence that the proceeds of such note were applied in discharge of the husband's debts is not sufficient to prove his authority (*a*). The wife may, however, be her husband's agent, with his assent, to accept and indorse bills even in her own name for him (*b*). Payment of interest by a wife on a promissory note, made by her when a *feme sole*, is no evidence of a promise to pay by the husband (*c*).

Bills of Exchange Act, 1882.

By the Bills of Exchange Act, 1882 (*d*), capacity to incur liability as a party to a bill of exchange is co-extensive with capacity to contract, so that a married woman can incur liability as a party to bills and promissory notes, and they will, like other contracts, bind her separate property, without any express reference being made to it; nor will any order of the Court to that effect be now necessary (*e*).

Authority of married woman to be executrix or administratrix.

A married woman could always be appointed an administratrix or executrix; it was, however, generally considered that she could not take probate or administer without the consent of her husband, although it has not been the practice to require proof of that consent (*f*). Payment to a married woman executrix of a debt due to her testator is a valid payment, even though her husband has refused to allow her to act (*g*); and a *feme covert* executrix could by will appoint an executor, so as to continue the chain of representation (*h*).

The Act of 1882 enacts, that a married woman who is an executrix, administratrix or trustee, may sue and be sued, and may do all acts relating to the property so vested in her as though she were a *feme sole* (*i*). Henceforth, therefore, a

(*a*) *Goldstone v. Tovey*, 6 Scott, 394.

(*b*) *Lindus v. Bradwell*, 5 C. B. 583.

(*c*) *Neve v. Hollands*, 16 Jur. 933.

(*d*) 45 & 46 Vict. c. 61, s. 22.

(*e*) *Barber v. Gregson*, 49 L. J., Q. B. 731.

(*f*) *Clerke v. Clerke*, 6 P. D. 103.

(*g*) *Pemberton v. Chapman*, Ell. Bl. & Ell. 1056.

(*h*) *Scammell v. Wilkinson*, 2 East, 552.

(*i*) 45 & 46 Vict. c. 75, s. 18.

married woman may accept the offices of trustee, executrix and administratrix without the consent or authority of her husband ; he will no longer incur any liability in consequence of her so doing, and he cannot be required to join in the administration bond (j).

Chap. III. s. 3.
Husband not
liable in such
case.

SECTION IV.

LIABILITY FOR THE CONTRACTS OF THE WIFE DURING
SEPARATION (k).

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FROM the last section it will have been collected that when the wife resides with her husband, and when the act is done by her as his agent in the ordinary course of and as part of domestic administration, there is a *primâ facie* presumption of her authority to bind him, which may be rebutted by contrary evidence. But when the wife is living apart from her husband, the presumption changes sides, and the *onus probandi* is thrown on

Chap. III. s. 4.

(j) *In the Goods of Harriet Ayres*, 8 P. D. 168.

(k) The separation here referred

to does not include cases in which there has been a decree for judicial separation.

Chap. III. s. 4. the party alleging the authority (*f*) ; for the law casts upon married persons the duty of cohabitation ; and a husband is not bound to support a wife who, without just cause, refuses to cohabit with him (*g*). *Prima facie*, therefore, a woman living apart from her husband has no authority to bind him.

Wife *prima facie* without authority.

The separation must be justified.

In order to fasten liability upon the husband, therefore, the separation must be justified. Thus, it was laid down by Lord Tenterden, that "when the wife is not living with her husband, there is no presumption that she has authority to bind him even for necessaries suitable to her degree in life. It is for the plaintiff to show that under the circumstances of the separation, or from the conduct of the husband, she had such authority. The mischief of allowing the ordering of goods by a married woman living apart from her husband to be *prima facie* evidence, so as to charge him for them, would be incalculable" (*h*). Hence "it is for the plaintiff to show that she (the wife, when absent from her husband) was absent from some cause which would justify her absence" (*i*). In *Clifford v. Laton*, the same judge said : "When a wife lives with her husband, he may in general be taken to be cognizant of her contracts ; but when they are living separate, it is for the party seeking to charge the husband to make out by proof that he is liable. If a shopkeeper will sell goods to every one who comes into his shop, without inquiry into their circumstances, he takes his chance of getting paid, and it lies on him to make out, by full proof, his claim against any other person" (*k*). And, again, in the same case it was said that it is the duty of tradesmen to inquire into the circumstances of the separation, before they part with their goods ; the *onus* lying on them to prove that the circumstances are such as will entitle them to recover against the husband (*l*).

The general presumption, therefore, is against the wife's

(*f*) *Mainwaring v. Leslie*, 1 Mood. & Malk. 18 ; *Edwards v. Towels*, 5 M. & G. 624.

(*g*) *Etherington v. Parrott*, 2 Lord Raym. 1006.

(*h*) *Mainwaring v. Leslie*, 1 Mood. & Malk. 18, and see Starkie on Evidence, part 4, 692 ; Selw. N. P.

Bar. & Fem. 1 ; *Montague v. Benedict*, 3 Barn. & Cr. 631.

(*i*) *Mainwaring v. Leslie*, 2 Car. & P. 507.

(*k*) *Clifford v. Laton*, 1 Mood. & Malk. 101.

(*l*) 3 Car. & P. 15, 16.

authority, and that presumption, every plaintiff suing a husband under such circumstances must displace, by showing that the wife's separation has arisen from no fault on her part (*m*); and it seems that now, since the Act of 1882, it must also be shown that the contract was not entered into by the wife with respect to her separate property (*n*). Where the action is brought against the wife, she must now, in order to displace her liability, show not only that the circumstances of the case justified her in pledging her husband's credit, but also that the contract was not entered into by her with respect to her separate property (*o*). In the absence of such proof, it would seem that, since the Act of 1882, a married woman possessing separate property, and living apart from her husband, has no authority to render her husband liable for necessities supplied to her. Chap. III. s. 4.

The wife goes forth to the world with an implied credit for necessities (1) where she has been deserted by her husband; (2) where her husband has turned her out of doors (*p*); (3) where her husband's misconduct has compelled her to leave him (*q*). Thus, if a wife quit her husband's house under a reasonable apprehension of personal violence, *that* will be equivalent to his turning her out of doors. The nature, however, of the threat which would justify a wife in refusing to return to her husband ought to be explained to the jury (*r*). If she quit because her husband has brought a common woman to reside in it, *that* is also a sufficient reason for her going; and it is no defence to an action for necessities supplied to her under such circumstances, that she has committed adultery previously to the credit being given, if the husband did not know of it till *after*, nor that after the credit she obtained a decree for *alimony*, which alimony was to relate back to a period before the credit (*s*). How separation may be justified.

(*m*) This proposition is stated in this form advisedly, because, whatever logicians may say, it is the constant practice to prove *negatives* in Courts of Justice.

(*n*) 45 & 46 Vict. c. 75.

(*o*) See *Johnson v. Gallagher*, 3 De G., F. & J. 494.

(*p*) *Hunt v. De Blaquiére*, 5 Bing. 550, 557; *Debenham v. Mellon*, 5

Q. B. D. 394.

(*q*) *Jewsbury v. Newbold*, 26 L. J., Ex. 247; *Baker v. Sampson*, 14 C. B., N. S. 383.

(*r*) *Biffin v. Bignell*, 31 L. J., Ex. 189.

(*s*) *Houliston v. Smyth*, 2 Car. & Pay. 22, where the case of *Horwood v. Heffer*, 3 Taunt. 421, was repudiated.

Chap. III. s. 4. Where the separation has taken place by mutual consent, the husband's obligation to maintain the wife continues, unless he shows that she is sufficiently provided for (*t*); and it is immaterial whether that provision is derived from the wife's separate property, or from the allowance of the husband, or partly from one source and partly from the other (*u*). In such a case, if the wife makes terms as to the income to be allowed to her, and that income proves insufficient, she has no authority to pledge her husband's credit.

Husband's request that she will return.

Where, however, a wife has left her husband, not by mutual consent, but upon grounds sufficient to justify her doing so, a simple request on his part that she will return to him does not of itself determine his liability for necessities supplied to her during the separation (*x*). And it is clear that if he only offers to take her back upon conditions which are improper, his liability continues (*y*).

When such request will determine husband's liability.

What circumstances will entitle a husband to require his wife's return, and when her refusal will put an end to his liability, were thus stated by Mr. Baron Garrow in *Reed v. Moore* (*z*):—

If a husband drives his wife from him by his misconduct, and sends her forth with an implied credit arising from their relative situation, it is his duty by some positive act to determine that liability. If his wife subsequently returns, his liability is at an end. But in default of any amicable arrangement, he must go to the Spiritual Court, and there obtain a decree for the purpose. And until some such unequivocal act is done, a person making a claim in a Court of law for necessities supplied to the wife is entitled to recover against the husband.

Where husband allows her a sufficient maintenance.

Where a husband living apart from his wife allows her enough for her maintenance, he is not liable for necessities supplied to her, and notice to the tradesmen of that allowance is unnecessary, because, if they inquire into the circumstances of her separation, they will find that she is not in a situation to

(*t*) *Liddlow v. Wilmot*, 2 Stark. 86;

Thompson v. Harvey, 4 Burr. 2177;

Dixon v. Hurrell, 8 Car. & Pay. 717.

(*u*) *Eastland v. Burchell*, 3 Q. B.

D. 433,

(*x*) *Emery v. Emery*, 1 You. & Jer. 501.

(*y*) *Reed v. Moore*, 5 Car. & Pay.

200.

(*z*) *Ibid.*

charge her husband; and if they do not choose to inquire, they trust her at their peril (a). Chap. III. s. 4.

A mere notice by the husband that he will not pay for goods supplied to his wife will avail nothing, if under the circumstances of the separation he is liable (b). Accordingly, in such a case the common practice of advertising in the newspapers, resorted to by husbands with the view of evading liability for the acts of their wives, is of no efficacy. Effect of a notice to tradesmen.

But if while husband and wife are separate, they both deal with the same tradesman, and he specially agree with the husband not to charge him for goods to be supplied to the wife, he will be bound by such special agreement, and cannot afterwards come upon the husband (c).

In *Johnston v. Sumner* (d), it was held by the Court of Exchequer, that where husband and wife separate by mutual consent and an agreed allowance is paid to her, the husband will not be liable even for necessities supplied to her without his knowledge, and the question of the adequacy of the allowance is not for the jury; and also that in all cases where the wife is living apart from the husband, it is for the plaintiff to show facts whence an authority to pledge his credit is to be inferred.

A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has actually been applied towards, her support upon an emergency, is entitled to stand in the place of the person who supplied the necessities, and to recover from her husband the sums so advanced; if, however, she has separate estate, money so advanced binds that estate (e). Advances to a wife deserted by her husband can be recovered.

The allowance made by the husband to the wife must be paid (f), or he will be held liable for necessities supplied to her; so also a decree for alimony, unless the alimony be paid, Where maintenance unpaid.

(a) *Mizen v. Pick*, 3 Mees. & Wel. 481; *Emmett v. Norton*, 8 Car. & Pay. 506; *Hindley v. Marquess of Westmeath*, 6 Barn. & Cres. 200; *Johnston v. Sumner*, 27 L. J., Ex. 341.

(b) *Dixon v. Hurrell*, 8 Car. & Pay. 717.

(c) *Dixon v. Hurrell*, ubi supra.

(d) 3 H. & N. 261.

(e) *Deare v. Soutten*, L. R., 9 Eq. 151; *Jenner v. Morris*, 29 L. J., Ch. 923.

(f) *Ozard v. Darnford*, S. N. P., 13th ed. 229.

Chap. III. s. 4. does not free him from his liability (g); and a wife, where there is default in payment of the separate maintenance, secured to her by deed, is not confined to her remedy on the covenant, but may bind her husband by contracting for necessities (h).

Wife of lunatic can pledge his credit.

The estate of a lunatic has been held to be liable for necessities supplied to his wife, who had no sufficient allowance (i); but in a case where the wife received all her husband's income while he was a lunatic, he was not held liable for necessary repairs done to his house by her order (k).

In *Drew v. Nunn* (l), a husband, who having held out his wife as having authority to pledge his credit, became insane, was held liable after recovery for goods supplied to her during his insanity, by a person who was unaware of the husband's insanity, on the ground that, although in the opinion of the Court insanity puts an end to the agent's authority, the defendant by holding out his wife as agent, had entered into a contract with the plaintiff that she had authority to act upon his behalf, and that, until the plaintiff had notice that this authority was revoked, he was entitled to act upon the defendant's representations.

Wife deserted by husband can pledge his credit for necessities supplied to child.

In a case where the wife was living with her child, aged seven, separate from her husband (the father of the child), for reasons which justified her in so doing, it was held by the Court of Queen's Bench (Blackburn, Mellor, Lush, JJ., Cockburn, C. J., diss.) that, as the child was by law properly in the care of the wife, the reasonable expenses of providing for it were part of the reasonable expenses of the wife, for which she had authority to pledge her husband's credit (m), and a person who advances money to a deserted wife for necessities can recover it from the husband (n).

For legal expenses in certain instances.

The legal expenses incurred by a deserted wife—(1) Preliminary and incidental to a suit of conjugal rights; (2) Obtain-

(g) *Hunt v. De Blaquiére*, 5 Bing. 550. See also *Marshall v. Rutton*, 8 T. B. 545, and *Murray v. Barlee*, 3 Myl. & K. 209, 220.

(h) *Nurse v. Craig*, 2 B. & P. N. B. 148.

(i) *Davidson v. Wood*, 32 L. J., Ch. 400; *Read v. Legard*, 20 L. J., Ex. 309.

(k) *Richardson v. Dubois*, L. R., 5 Q. B. 51.

(l) 4 Q. B. D. 661.

(m) *Bazeley v. Forder*, L. R., 3 Q. B. 559; 37 L. J., Q. B. 237.

(n) *Deare v. Soutten*, L. R., 9 Eq. 151; *Jenner v. Morris*, 3 De G., F. & J. 45.

ing counsel's opinion on the effect of an ante-nuptial settlement; Chap. III. s. 4.

(3) In obtaining professional advice as to the proper mode of dealing with tradespeople who are pressing her to pay them for various necessary articles supplied to her since she had been deserted, and also of preventing a distress threatened on her furniture—are necessities for which she has implied authority to pledge her husband's credit during his lifetime, and for which after his death his executors are liable (*o*). The costs, however, of a solicitor employed by a married woman to institute proceedings on her behalf for a judicial separation are not necessities for which the husband is liable, unless there was great probability of ultimate success (*p*).

Where the wife dies when living apart from her husband and is buried by the person in whose house she dies, in a manner suitable to her rank, the husband is liable for the funeral expenses incurred (*q*).

Husband's liability to stranger for wife's funeral expenses.

The wife's adultery puts an end to her authority to bind her husband for any debts which she may contract (*r*), and if she is living apart from him, relieves him from any liability under 31 & 32 Vict. c. 22, to maintain her (*s*); but if he condones or connives at the adultery, then his liability revives (*t*).

Adultery of wife relieves husband from liability.

Where a husband, in an action brought against him for necessities supplied to his wife whilst living apart from him, relies for defence upon the adultery of the wife, it is not sufficient to prove that a jury found her guilty of adultery, but the decree of the Divorce Court itself must be put in evidence; since where there is no judgment of the Divorce Court altering the status of the parties, the proceedings therein would afford no defence to an action (*u*).

(*o*) *Wilson v. Ford*, L. R., 3 Ex. 63.

(*p*) *Re Hooper*, 33 L. J., Ch. 300; *Browne v. Ackroyd*, 5 E. & B. 819; *Turner v. Rookes*, 10 Ad. & E. 47; *Beale v. Arabin*, 36 L. T., N. S. 249.

(*q*) *Bradshaw v. Beard*, 31 L. J., O. P. 273; 12 O. B., N. S. 344.

(*r*) *Morris v. Martin*, 1 Str. 647;

Mainwaring v. Sands, 2 Str. 706; *Emmett v. Norton*, 8 Car. & Pay.

506.

(*s*) *Culley v. Charman*, 7 Q. B. D. 89.

(*t*) *Cooper v. Lloyd*, 6 O. B., N. S. 519.

(*u*) *Needham v. Bremner*, L. R., 1 O. P. 583.

Chap. III. s. 4. A wife could always contract as a *feme sole* so as to bind herself, and sue or be sued, if her husband had been transported for felony (v).

Position of wife of felon. Although savings out of money, given by the husband to the wife for household purposes when they are living together, are the property of the husband, yet, when a husband makes an allowance to a wife who is living separate from him with his consent, he cannot recover back any savings she may make out of such allowance (x).

(v) *Carrol v. Blencow*, 4 Esp. 27; Stephen's Blackstone (4th ed.) v. II. 279; *Ex parte Franks*, 7 Bing. 762. Penal servitude is now substituted for transportation. Where the husband is an alien, see *Kay v. Duchess of Pienne*, 3 Camp. 123; where the husband is an

alien enemy, see *Barden v. Keverberg*, 2 M. & W. 61; *De Wahl v. Braune*, 1 H. & N. 178.

(x) *Brooke v. Brooke*, 25 Beav. 342; see also *Barrack v. M' Culloch*, 3 Kay & J. 110; *Johnson v. Gallagher*, 3 De G., F. & J. 494.

CHAPTER IV.

RIGHTS ARISING FROM THE DISSOLUTION OF
THE MARRIAGE BY THE HUSBAND'S DEATH.

SECTION I.

THE HUSBAND'S PERSONALTY—RIGHTS OF RELICT.

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THE dissolution of the marriage may be by the death of the husband; or by the death of the wife; or by divorce. Each, therefore, of these contingencies we will consider in their order. Chap. IV. s. 1.

If the dissolution of the marriage is occasioned by the death of the husband, and if he dies intestate, the widow is usually, unless she renounce, appointed his sole administratrix. Widow generally selected to administer.

This right she is entitled to under the statute 21 Hen. 8, c. 5, s. 3, which enacts that the ordinary shall grant administration "to the widow or next of kin or to both" at his discretion (a). Her right under the statute 21 Hen. 8, c. 5, s. 3.

Notwithstanding the words of this statute a joint grant to a next of kin and to a person entitled in distribution by representation to a deceased next of kin has, under special circumstances, with the consent of the next of kin, been made under the 73rd section of the Court of Probate Act, 1857 (b). But this has not been the usual practice (c).

(a) Williams on Exors., 8th edit., p. 415 *et seq.*, on the widow's right to administration. *In the goods of Browning*, 2 Sw. & Tr. 634.

(b) *In the goods of Grundy*, L. R., 1 P. & D. 459.

(c) See *In the goods of Browning*, 2 Sw. & Tr. 634.

Chap. IV. s. 1.

The Court
prefers a sole
to a joint ad-
ministration.

Cases where
claim of
widow is dis-
allowed.

As a rule the Court prefers a sole to a joint administration, and never forces a joint one (*d*). In modern practice the election of the Court is in favour of the widow (*e*), and she is never set aside except upon good cause being shown (*f*).

The Court has disallowed the claim of the widow in the following instances:—

1. When she has barred herself of all interest in her husband's personal estate by her marriage settlement (*g*).
2. When she is a lunatic (*h*).
3. When she has eloped from her husband or cohabited in his lifetime with another man (*i*).
4. When she has lived separate from her husband (*k*).

The circumstance of the widow having married again is not a valid objection (*l*).

A wife divorced for adultery forfeits her right to administer to her husband's effects (*m*).

Her distribu-
tive share
when there is
a child.

When the husband dies intestate, leaving a widow and child, or children, or representatives by direct descent of such child or children, his widow, by the Statute of Distributions, is entitled to *one-third* of his personal estate (*n*).

The phrase "Thirds of personal estate at common law," though formerly found in legal agreements, deeds and formal documents, seems void of meaning. There is now no distribution of intestates' personal estates by the common law; and the phrase is still more incorrect if used to express the interest which the widow takes under the statute (*o*).

(*d*) *In the goods of Newbold*, L. R., 1 P. & D. 285.

(*e*) *Goddard v. Goddard*, 3 Phillimore, 638; *Atkinson v. Barnard*, 2 Phillimore, 317.

(*f*) *In the goods of Anderson*, 3 Sw. & Tr. 489.

(*g*) *Walker v. Carless*, 2 Cas. temp. Lee, 560.

(*h*) *In the goods of Williams*, 3 Hag. (Ec.) 217.

(*i*) *Fleming v. Pelham*, 3 Hag. (Ec.) 217, n. (*b*); *Conyers v. Kitson*, 3 Hag. 556.

(*k*) *Lambell v. Lambell*, 3 Hag. 568; *Chappell v. Chappell*, 3 Curt. 429.

(*l*) *Webb v. Needham*, 1 Add. 494.

(*m*) *Pettifer v. James*, Bunbury, 16; *In the goods of Davis*, 2 Curt. 628.

(*n*) 22 & 23 Car. 2, stat. 2, c. 10, s. 6; 2 Black. Com. 515, 516.

(*o*) *Gurly v. Gurly*, 8 Cla. & Fin. 743. In this case Lord Cottenham asked, "What is the correct meaning of the expression, Thirds of personal estate at common law?"

When the husband dies intestate, leaving a widow only, such widow is, by the statute, entitled to *a moiety* or *half* of his personal estate. Chap. IV. s. 1.
When there is no child.

When the husband dies intestate, leaving a widow, but (as in the case of a bastard) no next of kin, the widow is not entitled to the whole of his personal estate; but one *moiety* or *half* belongs to her, and the other moiety or half goes to the crown (*p*). When there are no next of kin.

SECTION II.

THE WIDOW'S PARAPHERNALIA.

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It is probable that since the recent legislation questions as to paraphernalia will seldom arise; as, now that a husband can make a gift to his wife, and the wife can hold chattels as her Chap. IV. s. 2.

To which Mr. Pemberton Leigh answered, "It has no meaning. And it does not correctly express the in-

terest the widow would take under the Statute of Distributions."
(*p*) *Cave v. Roberts*, 8 Sim. 214.

Chap. IV. s. 2. separate property, articles which were formerly regarded as paraphernalia will now, in most cases, become her separate property. But in the few instances in which paraphernalia exist, it seems that the principles of law as to them remain unaffected by the Married Women's Property Act, 1882.

Articles of apparel, and personal ornament and convenience.

Claim to necessary clothing good even against creditors.

Husband can sell or give away paraphernalia, but cannot bequeath them.

Husband's possession of ornaments immaterial, if the wife had worn them on proper occasions. Value immaterial so long as suitable.

On the death of the husband, his widow may claim paraphernalia; that is to say, such articles of personal apparel, personal ornament, and personal convenience, suitable to her rank and degree, as she continued to use during the marriage. These she may retain against all the world, except creditors when there is a deficiency of assets (*q*). And, even then, her necessary clothing is protected; for, in the words of an ancient judicial resolution, "She ought not to be naked, or exposed to shame and cold" (*r*).

Neither can the husband by his will bequeath paraphernalia; though it appears he has the power (if unkindly inclined to exert it) to sell them, or give them away (*s*). They are therefore not to be considered as belonging to the wife during the marriage for her separate use (*t*). For her right of property in them does not arise till she becomes a widow; but vests in her immediately on the death of her husband (*u*).

As to personal ornaments, the husband's possession of them makes no difference, provided the wife wore them at intervals. And it is enough that she so used them (*x*) on birthdays and public occasions (*y*). Nor is the question of value in this respect material, so long as the articles are suitable to her degree (*z*).

(*q*) 2 Black. Com. 436; *Tipping v. Tipping*, 1 P. Wms. 730.

(*r*) 1 Rolle, 911, l. 55. If the husband deliver cloth to his wife for her apparel, and die before it be made up, she shall have the cloth. 1 Rolle, 911, l. 35; Com. Dig. Baron and Femme, Paraphernalia. A "necessary bed" is an article of paraphernalia. See Rolle & Comyn's Dig. ubi sup. cit.

(*s*) 2 Black. Com. 436; Noy's Max. c. 49.

(*t*) *Graham v. Londonderry*, 3 Atk. 393.

(*u*) Cro. Car. 344; Com. Dig. Bar. & Fem., Paraph.

(*x*) *Northey v. Northey*, 2 Atk. 77.

(*y*) *Graham v. Londonderry*, ubi supra.

(*z*) Cro. Car. 343; 1 Rolle, 911, l. 45; Com. Dig. Bar. and Fem., Paraph.; Toller's Executors, 3rd ed. p. 230, where he says, "The value makes no difference in the Court of

But the widow cannot claim, as paraphernal, articles which are in fact family heir-loom (a). Chap. IV. s. 2.

If a husband pawn his wife's paraphernalia as a collateral security for money borrowed, and gives power to the lender to sell for a sum certain, this will not be deemed an absolute alienation, but the paraphernalia (the power of sale not having been exercised) will stand as a pledge redeemable by the widow, who is entitled to have them redeemed, after payment of his debts, out of the personal estate of her husband (b). But she shall have no merely *ornamental* paraphernalia where there are not assets for the payment of debts (c). And before simple contract and specialty creditors were placed on an equality, if the former were not satisfied out of the personal estate, or, by standing in the place of specialty creditors, out of the real estate, the paraphernalia would have been applied to make good the deficiency (d). And this even although they were presents made to the wife by the husband before marriage, because under the old law they became on the marriage the property of the husband, and he could not be considered as

Widow cannot claim heir-loom.

She may redeem a pledge by her husband of her paraphernalia.

And may have the redemption money raised out of her husband's personal estate.

But creditors must first be satisfied.

Chancery." If so, the articles need not be suitable to the widow's degree. See *Northey v. Northey*, ubi supra.

(a) *Calmady v. Calmady*, 11 Vin. Abr. 181, 21. In this case, a husband having a crocheat of diamonds which had belonged to his first wife, devised it to his eldest son, directing also that it should go in succession to the heir of his family as an heir-loom. He afterwards married a second time, and converted the crocheat into a necklace, adding to it several new diamonds, the value of which was greater than the original value of the crocheat. Upon his death, the eldest son claimed the article by force of the will. But the second wife insisted on retaining it as part of her paraphernalia. The Lord

Chancellor Macclesfield doubted at first whether turning the crocheat into a necklace, adding new diamonds to it, and permitting the wife to wear it, did not amount to a revocation of the bequest to the heir. But he afterwards ordered the Master to examine and separate the old from the new diamonds, and decreed the former only to the heir, leaving the widow to enjoy the new diamonds. See also *Jervoise v. Jervoise*, 17 Beav. 566.

(b) *Graham v. Londonderry*, 3 Atk. 393.

(c) Cro. Car. 346; 1 Rolle, 911, l. 50, 35; Com. Dig. Bar. and Fem., Paraph.; *Ridout v. Earl of Plymouth*, 2 Atk. 104.

(d) *Snelson v. Corbet*, 3 Atk. 369.

Chap. IV. s. 2. a trustee of such presents for his wife (e), and although contingent assets should afterwards fall in (f).

Her right superior to that of any legatee.

But this will not apply to legatees; for their claims are merely voluntary; and, as observed by Lord Chancellor Maclefield in *Tipping v. Tipping* (g), "*Bona paraphernalia* are liable to creditors only;" a position which accords with Lord Hardwicke's doctrine in *Graham v. Londonderry* (h), where he held that the widow's right to paraphernalia is superior to that of any legatee, whether general or specific.

Marshalling assets in her favour.

On the death of the husband the widow's paraphernalia are liable to his debts, but not until after all his other assets real and personal have been exhausted; and therefore, if the paraphernalia should be taken by creditors in satisfaction of their demands, the widow will be entitled to stand in their place, and to reimburse herself out of the real or personal assets, whether in the hands of the heir or devisee, or personal representatives or legatee (i).

If not claimed by herself, paraphernalia cannot be demanded by her executor or administrator.

Paraphernalia would appear to be so far personal to the widow, that, if she do not herself claim them in her lifetime, they cannot after her death be demanded by her executor or administrator. Accordingly, if the husband should bequeath them to her for life and then over, and she should make no election to have them *quod bona paraphernalia*, her representative, after her decease, would be excluded (j).

Distinction between paraphernalia and gifts by a husband and stranger.

Paraphernalia and gifts to the wife as her separate property are essentially different. The latter are in every sense the absolute unfettered property of the wife. The former are the property of the husband during his life, vesting, if not disposed of by him during his life, in the wife on his death, if she survive him and claim them, but even then subject to the claims of her husband's creditors.

(e) *Ridout v. Earl of Plymouth*, 2 Atk. 104.

(f) *Burton v. Pierpoint*, 2 P. Williams, 78.

(g) 1 P. Williams, 729; and see 3 Atk. 393.

(h) 3 Atk. 393.

(i) *Snelson v. Corbet*, 3 Atk. 369;

Incedon v. Northcote, 3 Atk. 430, 438;

Tipping v. Tipping, 1 P. Wms. 729;

Aldrich v. Cooper, 8 Ves. 381, 397;

Boyntun v. Boyntun, 1 Cox, 106; 3 & 4 Will. 4, c. 104.

(j) *Clarges v. Albemarle*, 2 Vern. 246. Com. Dig. Bar. and Fem., Paraph.

Whether, under the old law, articles were paraphernalia or gifts to the separate use of the wife was not always easy to determine. A husband might indeed make gifts to his wife for her separate use; but the general rule was, that where he gave articles to his wife, to be worn as ornaments of the person, they were to be considered as paraphernalia: for, if they were looked upon as gifts to her separate use, she might dispose of them absolutely, which would be contrary to his intention (*k*). Gifts to a wife, under the old law, may be classified as follows:—

(1) Gifts by a husband to his wife, either before or after marriage, of articles of a paraphernal nature, were probably considered as paraphernalia; (2) Gifts by a husband to his wife before marriage, of articles not of a paraphernal nature, vested in him again on the marriage; (3) Gifts by a husband to his wife after marriage, of articles not of a paraphernal nature, might or might not be gifts to her separate use according to the intention; (4) but Gifts to a wife by third parties as the husband's father, or the wife's father or a stranger, either before or after marriage, were usually deemed *absolute gifts to her separate use* (*l*): and then neither the husband, nor his creditors, could dispose of them any more than they could dispose of any other property vested in trustees for her separate use.

The Married Women's Property Act, 1882, has effected considerable alteration in the law of gifts to a married woman. After the 31st December, 1882, any gift to a wife by her husband or by any other person will be her separate property, which she can hold or dispose of as if she were a *feme sole* (*m*). The inability of the husband to make a gift of, or transfer any property, article or ornament directly to his wife is swept away, for a married woman is rendered capable on and after the 1st January, 1883, of acquiring, holding and disposing of any personal property as if she were a *feme sole* without the intervention of a trustee.

Effect of the Act of 1882 upon gifts to a married woman.

The results are that, on and after 1st January, 1883, all gifts

(*k*) *Graham v. Londonderry*, 3 Atk. 393. also *post*, Chap. on Recent Legislation.

(*l*) *Ibid.*, 2 Rop. 143; Williams on Executors, 8th edit. 776. See (*m*) 45 & 46 Vict. c. 75, s. 1, sub-ss. 1, 2, 5.

Chap. IV. s. 2. to a wife by her husband of articles of personal apparel, ornament or convenience will be her separate property, unless they are either only lent to her for her use, or expressly given as paraphernalia; that the mere fact of the articles being of a paraphernal nature will not necessarily render them paraphernalia, and so liable to be disposed of by the husband in his lifetime, and subject to the claims of his creditors during his life and after his death; but that clear evidence will be required to show that they were when given, given with the intention of being paraphernalia and not separate property; and that all gifts to a wife by any other person than her husband must necessarily be her separate property.

Origin of the term paraphernalia.

The word paraphernalia has been borrowed from the Civilians, who themselves derived it from the Greeks. Its meaning with us, however, is very different from its more ancient signification. By the Roman law, the wife was not *in viri potestate*; and nothing passed to the husband by the marriage but the *Dos* or Dowry (*o*). The residue of the wife's property continued *separate property*, over which she exercised an independent dominion *non obstante matrimonio*. This separate property was called her *parapherna* or *peculium*. How entirely it was excluded from the husband's power appears by the following mandate of the Roman code:—"Decernimus ut vir, in his rebus quas extra dotem mulier habet, nullam habeat communionem, uxore prohibente, nec aliquam ei necessitatem imponat. Quamvis enim bonum erat, mulierem, quæ seipsam marito committit, res etiam ejusdem pari arbitrio gubernari,—attamen nullo modo, muliere prohibente, virum in paraphernis se volumus immiscere" (*p*). It really meant property of her own, not surrendered by her at her marriage; property reserved and kept back from the *Dos*, or fortune, which she brought her husband (*q*): and not as in

(*o*) The Latin *Dos* is translated not by *Dower*, but by *Dowry*; things not only different from, but opposite to each other. What we call Dower was unknown to the Romans, 1 Cruise's Dig. 128. See Glanville, lib. 7, c. 1, where he says, "Secundum Leges Romanas proprie

appellatur Dos id quod cum muliere datur viro."

(*p*) Cod. v. 14, 8.

(*q*) Paraphernalia Bona quibusvis ex rebus consistant sunt ea quæ a dote semper distincta in usum mulieribus erant, atque in earum arbitrio posita.

English law according to Blackstone, "something over and above her dower:" dower being used in the legal sense of the interest she was entitled to in her husband's real estate on his death. Moreover, it belonged to her as her absolute separate property *during and throughout the marriage*. Whereas the wife in England does not become entitled to her paraphernalia till the husband dies; and although he cannot bequeath them, he may sell them in his lifetime, or give them away. The Roman *parapherna* corresponded not with the English paraphernalia; but it did correspond with, and seems very much to resemble, the separate estate of married women in this country originally invented and contrived by courts of equity; and now, since the 31st December, 1882, attached and extended by statute to all the property of married women.

The Roman parapherna resembled the English separate estate.

Chap. IV. s. 2.

SECTION III.

THE RIGHT OF THE WIDOW BY SURVIVORSHIP TO HER CHATTELS REAL.

The widow was always entitled to such of her chattels real as were found, at her husband's death, undisposed of by him in his lifetime; for the husband could not by will dispose of his wife's chattels real (*r*).

Chap. IV. s. 3.

As, since the 31st December, 1882 (*s*), the husband takes by marriage no interest whatever in his wife's chattels real during her life, and they are her separate property, and cannot be disposed of by him, it is almost unnecessary to state that the death of the husband, leaving the wife surviving, adds nothing to the existing right of the widow to hold and dispose of her own property.

(*r*) See Williams on Exors., 8th ed. p. 697. (*s*) 45 & 46 Vict. c. 75.

SECTION IV.

THE RIGHT OF THE WIDOW BY SURVIVORSHIP TO HER
CHOSES IN ACTION.

Chap. IV. s. 4. The subject of this section has, since the Married Women's Property Act, 1882, ceased to be of any importance, except where the marriage has taken place before the 1st January, 1883, and the right to the chose in action has accrued before that date. As in every other case the wife's chose in action is her separate property (being in the Married Women's Property Act, 1882, included in the term "property" (*r*)), and her right to it is unaffected by marriage, no additional right can accrue to her by the death of her husband. This section, therefore, applies only to the above-mentioned exception.

Widow's right
to her choses
in action arose
on death of
husband.

Prior to the Married Women's Property Act, 1882, as stated in a former chapter (*s*), the right of a husband to his wife's choses in action was an inchoate right, which only became absolute by his reducing them into possession during the coverture. If he had not done so, upon the death of the husband the widow's right by survivorship arose (*t*).

The rule in equity, as we have seen (*u*), was that nothing short of actual reduction into possession by the husband, or his assignee, would bar the widow's right by survivorship.

The common law courts, however, at one time appear not to have been so rigid. For in *Gaters v. Madeley* (*x*), the right of survivorship was held by one of the learned judges (the others not dissenting) to be defeated, the moment it appeared that the husband in his lifetime had made an election to take the chose in action to himself, and had dissented to his wife's having any interest in it.

If the husband had in his lifetime brought an action upon this note in his own name, *that* would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is; and in that case the remedy on it survives to the wife; or he may, according to the decision in *Philliskirk v. Pluckwell* (*y*), adopt another course, and join her name with his own; and in that case, if he should die after

(*r*) 45 & 46 Vict. c. 75, s. 24.

(*u*) *Ante*, p. 32.

(*s*) *Ante*, pp. 31, 32.

(*x*) 6 Mee. & Wel. 423.

(*t*) *Fleet v. Perrins*, L. R., 3 Q. B.

(*y*) 2 Mau. & Sel. 393.

536; *ibid.* 4 Q. B. 500.

judgment, the wife would be entitled to the benefit of the note, as the Chap. IV. s. 4. judgment would survive to her (z).

This doctrine of *election* and *dissent* was never adopted by the courts of equity, and is now of course entirely exploded.

In *Fleet v. Perrins* (a), the action was brought by the plaintiff as administratrix of one Mary Anne Ross, deceased, for money had and received by the defendant to the use of M. A. Ross. The defendant had received money from a third person to be appropriated to the use of M. A. Ross, then the wife of T. R. Ross, and he wrote telling her that he held the money at her disposal. T. R. Ross survived his wife, and died, never having at any time interfered in any way as to the money. It was held on these facts that the wife's representative, and not the husband's, was the proper party to sue for the money, as the facts showed a chose in action conferred on the wife with which the husband had not interfered during coverture.

Causes of action, which accrued during the coverture, in respect of the wife's real estate, or in respect of any personal wrongs done her, survived to her on the death of her husband (b).

When a man covenanted to pay a woman an annuity for life, and afterwards married the annuitant, it was held, by the Judicial Committee of the Privy Council, that the annuity was only suspended, and not extinguished, by the marriage, and therefore that the widow was entitled to recover arrears accrued subsequently to the death of her husband (c). It is apprehended that in the case of a marriage in similar circumstances since the 31st December, 1882, the right to the annuity would not be suspended by the marriage; but it is not certain whether the widow could recover arrears accrued during the coverture, when she had been maintained by her husband in a manner suitable to her station (d).

(z) Per Baron Parke, in *Gaters v. Madeley*, 6 M. & W. p. 427. See also *Sherrington v. Yates*, 12 M. & W. 855; *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atcheson*, 7 Q. B. 864.

(a) L. R., 3 Q. B. 536. Affirmed, *ibid.* 4 Q. B. 500. Compare *Bird v. Pegrum*, 13 C. B. Rep. 639; 22 L. J., C. P. 166, where money had

actually come to the hands of the wife and had been subsequently lent by her, and it was held that the husband after the death of the wife could sue in his own name.

(b) *Woodman v. Chapman*, 1 Camp. 189, n.

(c) *Fitzgerald v. Fitzgerald*, L. R., 2 P. C. 83.

(d) *Ridout v. Lewis*, 1 Atk. 269.

SECTION V.

DOWER.

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Chap. IV. s. 5.

Antiquity and
universality
of right.

The law of primogeniture, by which land on the father's death goes exclusively to the eldest son, was qualified, from the earliest times, by allowing a third to the widow for life, not only to support herself, but also for the nurture, maintenance and education of the younger children. This was called her dower; than which, in its simple original state, no right known to the law could well be deemed more reasonable and just. It was, in fact, an indispensable social institution, universally adopted under the feudal system. Insomuch that dower, or

something analogous to it, by whatever name distinguished, was Chap. IV. s. 5. recognized, enforced and protected in all parts of Europe.

However well suited to a primitive state of society, dower, with the progress of civilization, ceased to be an assured support to the widow, while it created a most serious obstacle to the alienation of land. These results were mainly attributable to the early decisions of the judges, that dower did not attach to equitable estates, and that land acquired during the coverture was subject to dower in the same way as that of which the husband was seised at the date of the marriage. The anomalous state of the law whereby curtesy was, although dower was not, allowed out of equitable estates, admits of the following explanation:—Uses, before the statute (*d*), gave no right either to curtesy or dower: for the common law regarded nothing but the *legal* title; and equity, at that time, was feeble and imperfect. After the statute, trusts were deemed the same thing as uses had been before the statute. Dower, accordingly, did not arise upon them. So that when the husband's estate was merely equitable, he could sell and alienate it without his wife's concurrence, and the purchaser's title was unencumbered by dower. So many sales had been effected on this assumption, that when the Court of Chancery came, at last, under the administration of a succession of great men, to understand the proper functions of equity, it was too late to interfere.

How it proved inconvenient.

Why curtesy of trusts allowed, but dower of trusts refused.

But no such impediments existed to prevent its interposition in the case of curtesy. There were, and there could have been, no sales of the *wife's* estate, without the husband's concurrence. Consequently, equity experienced no difficulty in awarding curtesy out of trust or equitable estates, which it did by an exercise of its corrective jurisdiction. The same reasons, indeed, applied with equal force in the case of dower; but from the number of transactions concluded upon a contrary principle, and the hazard of disturbing titles, it was thought that the extraordinary remedies of the Court of Chancery might, with respect to dower after such a lapse of time, do more harm than good. The consequence was that dower was left to stand on its ancient

(e) Statute of Uses, 27 Hen. 8, c. 10.

Chap. IV. s. 5. footing under the common law, by which trust or equitable estates were not recognized. And it also was liable to be defeated by an outstanding term (f).

Upon the decision in *Radnor v. Vandebendy*, Mr. Cruise observed, that the doctrine established by it was—

Contrary to the general principles of equity, which has never extended its protection in any other instance to purchasers with notice of incumbrances. The true and only reason on which it was founded was the silent, uniform course of practice, uninterrupted, but at the same time unsupported, by legal decisions; an opinion having been generally adopted by the conveyancers, that a satisfied term would protect a purchaser from the claim of dower; and many estates having been purchased under this opinion.

It was afterwards decided that mortgagees were within the same privilege. But it was not allowed to extend to volunteers: for example, to heirs. In such cases, if there were a satisfied term outstanding, the widow might come into equity to have it put out of the way, so as to give her the benefit of dower.

Dower held to attach to land acquired during coverture and sold.

The inconvenience arising from the decision, that dower attached to land acquired by the husband during the coverture, and sold by him during his life, precisely in the same way as if the possession had been in the husband at the date of the marriage, and had continued in him undivested until the moment of his death, led to many ingenious and laudable contrivances to evade or to defeat the injustice of the law. Accordingly, we have, among other expedients, the celebrated “conveyance to uses to bar dower;” which, of all the inventions of the conveyancers, was the most happy and successful. It was, indeed, a great triumph, and deserves the praise which the lovers of technical erudition have invariably bestowed upon it.

The subject of Dower was very fully considered by the Real Property Commissioners, who, in their First Report, suggested the alterations in the law which were afterwards carried into

(f) *Lady Radnor v. Vandebendy*, Cruise's Dig. tit. Trust. In this case the House of Lords seemed inclined to decide the contrary, but did not, on the ground that it had always been the opinion of convey-

ancers that a term or statute prevented dower, and that the consequence of an alteration would be much more dangerous than a continuance of the old rules.

effect by the "Act for the Amendment of the Law relating to Dower" (g). Chap. IV. s. 5.

This Act, which came into operation on the 1st January, 1834, and is not retrospective, conferred upon widows the right to dower out of equitable estates (h); but this extension of the right was more than counterbalanced by the provisions of the Act, which left the dower of the widow completely at the mercy of the husband during his life. The Dower Act.

The 2nd section provides, that when a husband shall die beneficially entitled to any land for an equitable estate of inheritance in possession (other than an estate in joint tenancy), his widow shall be entitled in equity to dower out of the same land. It has been held, under this section, that a devise by a husband of all his real estate upon trust to sell was such a disposition by will as deprived the widow of her dower (i).

The 3rd section gives dower to the widow where the husband had merely a right of entry, or of action, for the recovery of the land.

But the 4th section enacts that no widow shall be entitled to dower "out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will." So that the widow's dower—on the faith, peradventure, of which she has married—is by this clause put under the absolute power of the husband, to sustain, to abridge, to mutilate, or to destroy. No wife, therefore, can be safe under this law, unless she have had a settlement. Whether *that* is a fit rule for an enlightened people to adopt in the most important of all contracts, is left for others to discuss; only observing that if husbands were uniformly wise, just, and generous, the enactment might pass without comment. Looking, however, at the world as it is; remembering that husbands are occasionally apt to be improvident, thoughtless, capricious; that they sometimes even quarrel with their wives, and upon slender grounds; that they are not always free from sinister influences, especially in their languishing and dying moments; and finally, adverting to the great power which the law at that time gave them in other respects Dower placed entirely in husband's power.

Remarks on that provision.

(g) 3 & 4 Will. 4, c. 105.

(h) *Ibid.* sect. 1.

(i) *Lacey v. Hill*, L. R., 19 Eq.

346, where Jessel, M.R., dissented from the dicta in *Rowland v. Cuthbertson*, L. R., 8 Eq. 466.

Chap. IV. s. 5. over the wife's property; this provision of the Act does seem, upon the whole, one of the most unsatisfactory and inexplicable in modern legislation (*n*).

Under this section, a husband's contract to sell (although no conveyance be executed) will bar the right to dower; upon the principle that what is agreed to be done shall be considered in equity as performed.

The 5th section of the Act enacts that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

A declaration that the widow shall not be entitled to dower contained in the deed conveying the land to the husband, or in any deed executed by him (*o*), or in his will (*p*), is sufficient to deprive the widow of her right to dower (*q*).

(*n*) A learned author (than whom there is none more conversant with the law of real property), adverting to the new enactments respecting dower, says, "The wife's estate may be defeated by the husband; and, even without an expressed intention on his part, her interest is postponed in favour of his debts and incumbrances. There is, however, a good deal to be said for the late alterations. In early times land was the property most regarded, and looked to as that which should supply a livelihood for the owner's widow. But when it was decided that dower could not be had of a trust estate, and when effect was given to legal limitations invented for the purpose of preventing dower, the old provision for a widow could not be relied upon. Besides, as personal property increased, and was made available for family purposes, settlements of it supplied more convenient resources. And though the interests of married women in their husband's lands

had been greatly affected, yet the contrivance of provisions for their separate use gave them a solid advantage, and enabled them to have funds safe from their husband's power, and appropriated for their own enjoyment and disposition; arrangements hardly known or thought of when dower was in its vigour." This is all very just; but it leaves untouched the question whether a woman marrying under a law which tells her that she is dowerable of her husband's estate, ought to be left subject to the risk of starvation in every case where she has no separate property, and where she omits, before her marriage, to call in the aid of a synod of conveyancers.

(*o*) Sect. 6.

(*p*) *Thompson v. Watts*, 31 L. J., Ch. 445.

(*q*) Sect. 7. See *Dyke v. Rendall*, 2 De G., M. & G. 209; *Fry v. Noble*, 20 Beav. 598; 7 De G., M. & G. 687.

The right of the widow to dower is subject to any conditions, restrictions or directions which shall be declared by the will of her husband (r). Chap. IV. s. 5.

By the 9th section it is enacted, that where a husband should devise any land out of which his widow would have been entitled to dower if the same had not been so devised, or any estate or interest therein, to or for the benefit of his widow, such widow should not be entitled to dower out of or in any land of her said husband, unless a contrary intention should be declared by his will.

A partial interest in the proceeds of sale of real estate, devised to trustees upon trust for sale, is "an estate or interest" in the land within the meaning of this section (s).

It is also provided, that no gift or bequest made by the husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will (t).

The 11th section preserves the powers of courts of equity to enforce any covenant or agreement entered into, by or on the part of any husband, not to bar the right of his widow to dower out of his lands or any of them.

Courts of Equity may still enforce covenants not to bar dower.

Wherever, therefore, a husband sells an estate, the purchaser should ascertain that there has been no covenant or agreement preventing the vendor from barring the wife's right to dower. How the fact stands, it will not always be easy to find out; and sometimes the discovery may be beyond the reach of any diligence that a purchaser can exercise (u).

(r) Sect. 8.

(s) *Rowland v. Cuthbertson*, L. R., 8 Eq. 466; *Lacey v. Hill*, L. R., 19 Eq. 346.

(t) Sect. 10.

(u) The purchaser, however, may be protected by having the legal estate, and by want of notice. In *Jones v. Smith*, 1 Phill. 244, a mortgagee was told that there was a settlement, but was also told that the particular estate was not in-

cluded in it, and he advanced his money without seeing the settlement; yet the Court refused to interfere against him. If, however, a purchaser chooses to take a mere equitable estate, he may incur danger. Even a *parol* antenuptial agreement, interdicting a husband from barring a wife's dower, might possibly be enforced, although evidenced only by a document signed *after* the marriage. See the reason-

Chap. IV. s. 5.

When legacies
in satisfaction
of dower are
preferable.

The 13th section abolished dower *ad ostium ecclesie* and dower *ex assensu patrie* which had long become obsolete.

Before the Dower Act, a legacy given to a wife in lieu of dower, or in consideration of her releasing her dower, was in case of a deficiency of assets entitled to priority over other legacies (*x*); on the ground, apparently, that she became a purchaser of her legacy by releasing her dower (*y*). Accordingly, if at the death of the testator his widow was not entitled to dower, the principle did not apply (*z*). In *Acey v. Simpson* (*a*), a testator gave an annuity to his widow, and declared that it should be taken by her in lieu and full satisfaction of and for all dower or thirds at common law or by custom which she might otherwise claim from or upon all or any of his real estates. It appeared that there were no real estates out of which the widow was dowable, and it was admitted that priority could not be successfully claimed.

The 12th section of the Dower Act provides, that nothing in the Act shall interfere with any rule of equity, or of any ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower were entitled to priority over other legacies. This section does not mean that, in all cases, for the purpose of ascertaining the widow's right to priority, her title to dower is to be determined under the old law; but merely that the principle of the previous decisions is not to be affected by the Act. In order to gain priority in respect of a legacy in lieu of dower, a widow married since the 1st January, 1834, ought therefore to be actually entitled to dower under the new law; and it has been accordingly held (*b*), that the widow was not entitled to priority where the only real estate of the testator had been conveyed to him with a declaration against dower. There was in this case a complete disposition by the will of all the testator's

ing in *Hammersley v. De Biel*, 12 Cl. & Fin. 45; and in particular the remarks of Lord Cottenham, both in the Court below and in the House of Lords.

(*x*) *Burridge v. Brady*, 1 P. Wms. 127; *Norcott v. Gordon*, 14 Sim. 258;

Stahlschmidt v. Lett, 1 Sm. & G. 421.

(*y*) *Blower v. Morrett*, 2 Ves. sen. 420.

(*z*) See *Heath v. Dendy*, 1 Russ. 543.

(*a*) 5 Beav. 35.

(*b*) *Roper v. Roper*, 3 Ch. D. 714.

real estate, but it seems to have been the opinion of the learned judge (c) who decided the case, that when the will itself barred the widow of her right to dower, the 12th section applied, and gave her priority as if the Act had not been passed. Chap. IV. s. 5.

To establish the widow's right to dower it seems superfluous to say that she must previously have been the lawful wife of her deceased husband. Yet this is much insisted upon by Mr. Roper (d), who gravely informs us that the husband's second marriage during the life of his first wife will not entitle the second widow to dower; to which he adds another proposition equally self-evident, namely, that if a wife take a second husband before her first husband dies, she will not be dowable out of the second husband's estate. It has been recently decided (e), that a dissolution of marriage under the Divorce Act (f) destroys the right to dower. To establish right to dower there must have been a valid marriage.

Under the former law there was a distinction which deserves to be noticed, although it has been abolished by Lord Lyndhurst's statute (g). If a marriage were contracted within the forbidden Levitical degrees, it could not be set aside after the death of either party. If, therefore, it continued unimpeached during the husband's life, the right to dower would on his death be effective. This was the ancient law; but all such marriages, formerly voidable only, are now absolute nullities, and can generate no right whatever. Change in this respect by Lord Lyndhurst's Act.

Subject to the provisions of the Dower Act, which, as we have seen, enable the husband in various ways to deprive his widow of dower, the following conditions must be fulfilled, in order to entitle a widow to dower:— Conditions necessary to entitle widow to dower.

1. Legal marriage.
2. A several estate of inheritance in possession, of or to which the husband is seised or entitled.
3. Possibility that issue, if any, should inherit the estate.
4. Death of the husband.

Before the Dower Act, questions frequently arose as to whether Widow might have to elect

(c) *Malins*, V.-C.

D. 164.

(d) 1 *Rop.* 333.

(f) 20 & 21 *Vict. c.* 85.

(e) *Frampton v. Stephens*, 21 *Ch.*

(g) 5 & 6 *Will.* 4, c. 54.

Chap. IV. s. 5. the widow was put to her election between her dower and some benefit conferred upon her by the will of her husband (*h*).

between
dower and
benefits under
will of her
husband.

A case of election might have been raised either by express words, or by some disposition of the land "inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds" (*i*). What amounted to inconsistency of disposition was not always easy to determine; but it has been decided that a direction to trustees to permit the widow to use, occupy and enjoy certain lands (*k*), or to manage and cut timber (*l*), or to grant leases (*m*) even where, according to the customs of the manors of which the lands were held, the widow was not entitled to be admitted, or to have her dower set out by metes and bounds (*n*) was inconsistent with her right to dower.

But in the case last referred to, the presumption that the testator intended to put the widow to her election was corroborated by a gift to the widow of a rent-charge out of part of the land subject to freebench, and a devise to her for her life of part of the land so subject. On the other hand, a devise to the widow of part of the land (*o*), or a gift to her of an annuity charged upon the land (*p*), or a devise to trustees upon trust for sale (*q*), have been held not to indicate an intention to put the widow to her election.

The question of election by a widow between her dower and the benefits bestowed upon her by the will of her husband, can scarcely arise where the marriage has taken place since the 1st January, 1834, except in the case of copyholds to which the Dower Act does not apply, for in such cases the widow has no

(*h*) *Boynton v. Boynton*, 1 Bro. C. C. 445; *Nottley v. Palmer*, 2 Drew. 93; and see *Fytche v. Fytche*, L. R., 7 Eq. 494.

(*i*) *Birmingham v. Kirwan*, 2 Sch. & L. 444.

(*k*) *Miall v. Brain*, 4 Mad. 119.

(*l*) *Parker v. Sowerby*, 4 D. M. & G. 321.

(*m*) *Hall v. Hill*, 1 Dru. & War. 94; *Roadley v. Dixon*, 3 Russ. 192.

(*n*) *Thompson v. Burra*, L. R., 16 Eq. 592.

(*o*) *Lawrence v. Lawrence*, 2 Vern. 365; 3 Br. P. C. 483.

(*p*) *Dowson v. Bell*, 1 Keen, 761.

(*q*) *Ellis v. Lewis*, 3 Hare, 310; *Gibson v. Gibson*, 1 Drew. 42. See also *Chalmers v. Storil*, 2 V. & B. 222; *Taylor v. Taylor*, 1 Y. & C. C. C. 727; *Reynard v. Spence*, 4 Beav. 103; *Grayson v. Deakin*, 3 De G. & Sm. 298.

right to dower which cannot be defeated by the testamentary disposition of her husband. Chap. IV. s. 5.

The right to dower may also be excluded by any provision which is accepted by an adult female previous to marriage in satisfaction of her dower (*r*). Where a wife joined with her husband in making a mortgage in fee of a freehold estate, upon which her inchoate right to dower had attached, her dower was destroyed in equity as well as at law; and she had no right to redeem the estate (*s*). Dower may be barred by antenuptial provision.

Dower may be claimed out of all corporeal hereditaments, and out of all incorporeal hereditaments that savour of the realty; as rents, estovers, commons, advowsons, fairs, profits of courts, tithes, woods, mills, piscaries, tolls arising from public navigable rivers, and the like (*t*). Out of what dower may be claimed.

The widow likewise is dowable of mines and minerals worked in the husband's lifetime; but not of mines unopened (*u*). Mines worked in husband's lifetime.

She is not dowable of a mere annuity granted to the husband and his heirs: because *that* is a personal demand, not issuing out of any lands or tenements (*x*). Case of an annuity to husband and his heirs.

It is a maxim that the widow shall be endowed *de optimâ possessione viri*. If, therefore, lands which had been sown with corn and grain by the husband be assigned to her for dower by the heir, she will be entitled to the crops (*y*). Crops of corn and grain.

She is also entitled to emblements, and may dispose of them (*z*). Emblements.

The claims of mere creditors of an intestate have no priority over the widow's right of dower (*a*). Creditors no priority.

Where land belonging to an infant, subject to his mother's right of dower, is taken by a railway company, and the purchase-money paid into Court under the Lands Clauses Act, the widow is entitled to have the value of the dower, as determined by the valuers, paid to her out of the fund in Court (*b*). Land taken by railway company.

(*r*) *Dyke v. Rendall*, 2 D. M. & G. 209; and see *Caruthers v. Caruthers*, 4 Bro. C. C. 500.

(*s*) *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218.

(*t*) 1 Rep. 342.

(*u*) *Stoughton v. Leigh*, 1 Taunt. 402; *Dicken v. Hamer*, 29 L. J.,

Ch. 778.

(*x*) *Earl of Stafford v. Buckley*, 2 Ves. sen. 170.

(*y*) 1 Rep. 351.

(*z*) 1 Rep. 426.

(*a*) *In re Hall*, L. R., 9 Eq. 179.

(*b*) *Spyer v. Hyat*, 20 Beav. 621.

Chap. IV. s. 5. It would seem that she is clearly liable to one-third of the duties attaching to the estate; upon which principle she must contribute her proportion to keep down interest (c).

Widow bound to keep down interest.

As a tenant for life, she is liable for all waste committed by herself or strangers (d).

Liable for waste.

How far she is answerable for letting the buildings fall into decay does not appear to have been the subject of any authoritative resolution.

Dower forfeited by adultery.

By the Statute of Westminster (e) a wife guilty of adultery forfeits her dower; and it has been recently decided that the dissolution of the marriage produces the same effect (f).

Statute of Limitations, 37 & 38 Vict. c. 57.

A widow's right to sue in equity is barred if she does not commence proceedings within twelve years after the right first accrued (g); and only six years' arrears can be recovered (h).

SECTION VI.

THE WIFE'S EQUITY OF REDEMPTION AND EXONERATION.

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Chap. IV. s. 6. In cases where the husband and wife joined in mortgaging the wife's estate of inheritance, and the mortgage money was

Her equity to redeem her real estate.

- (c) 1 Rop. 371, 376.
(d) Co. Litt. 53, 54; 2 Inst. 303.
(e) 13 Edw. I. c. 34.
(f) *Frampton v. Stephens*, 21 Ch.
- D. 164.
(g) 37 & 38 Vict. c. 57, s. 1; and see *Marshall v. Smith*, 5 Giff. 37.
(h) 3 & 4 Will. 4, c. 27, s. 41.

not applied for the exclusive benefit of the wife, the equity of redemption belonged to her and her heirs, and her estate was treated as a surety for the debt of the husband (i). The same result followed, when the separate property of the wife formed the subject-matter of the mortgage, and the husband joined in the deed, received the money and covenanted to repay it (k). This doctrine does not seem to be affected by the recent changes in the law of husband and wife; but, in order to entitle the wife's estate to exoneration, it must still be shewn that the money was received by the husband, and it would also seem that he must be a party to the mortgage deed and covenant for payment of the money.

Upon mortgages of the wife's estate very nice and difficult questions occasionally arise. In general, it will be construed that the equity of redemption remains in the wife and her heirs. But it may happen, and has been often found, that the equity of redemption is transferred to the husband and his heirs. Before the wife, however, can thus be deprived of her estate, it must be made quite manifest that a *change of property* was intended (l). Thus, where an estate belonging to the wife was mortgaged, and the equity of redemption was in words reserved to the husband and his heirs, the Court held that there was a resulting trust for the wife and her heirs (m). In another case, a husband, having married a widow who had an estate in fee under the will of her former husband, procured her to join him in a mortgage of the estate, reserving the equity of redemption to the husband and his heirs; without recital in the deed of anything special, to show that it was intended to make a new settlement of the estate. It was decreed that the equity of redemption had not been taken out of the wife; and, consequently (she having died), that her son by her first marriage was entitled to it (n). Again, where a wife joined in a mort-

Where reserved to the husband, a resulting trust for the wife will be raised.

(i) *Huntingdon v. Huntingdon*, 2 Bro. P. C. 1; *Jackson v. Innes*, 1 Bli. 104, 115, and cases there cited.

(k) *Hudson v. Carmichael*, Kay, 613. See also *Clinton v. Hooper*, 3 Bro. C. C. 201, at p. 213; *Thomas*

v. Thomas, 2 K. & J. 79.

(l) *Wood v. Wood*, 7 Beav. 183.

(m) *Jackson v. Innes*, 1 Bli. 104, 115.

(n) *Ruscombe v. Hare*, 6 Dow. 1; see also *Whitbread v. Smith*, 3 De G., M. & G. 727; *Hipkin v. Wilson*,

Chap. IV. s. 6. gage for the purpose of releasing a rent-charge to which she was entitled under her marriage settlement, it was held that the release, although absolute in form, was to be limited by the purpose for which it was made, and that the equity of redemption was subject to the trusts of the original settlement (*o*).

But dower destroyed if released for purposes of mortgage.

The contrary rule prevailed in the case of dower. If the wife joined in a mortgage in fee for the purpose of releasing her dower, it was held that her right was extinguished in equity as well as at law; and that she had no right to redeem or to claim exoneration out of her husband's estate (*p*).

The husband will only have the equity *jure uxoris*.

The general rule was that, where husband and wife mortgaged the wife's estate, and the equity of redemption was reserved to the husband and his heirs, without recital of special circumstances to show an intention to make a new settlement of the estate, the husband took the equity of redemption only *jure uxoris*.

Mere form of the reservation immaterial.

"And in considering this question," says Lord Redesdale, "the mere form of the reservation of the equity of redemption will not of itself be held sufficient to alter the previous title. In such a case (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage" (*q*).

But if a change were really intended, effect must be given to it.

How proved.

"But if it clearly appear to have been the intention of the wife that the husband should have the equity of redemption, he *must* have it" (*r*). This intention may be established by parol evidence (*s*), or "it may be shewn on the face of a mortgage deed, that there is an intention to re-settle the equity of redemption, but it must be shewn by something which bears expressly on that identical point" (*t*).

3 De G. & Sm. 738; *Plowden v. Hyde*, 2 De G., M. & G. 684; *Lord Hastings v. Astley*, 30 Beav. 260.

(*o*) *Wood v. Wood*, 7 Beav. 183; *Re Betton's Trust Estates*, L. R., 12 Eq. 553.

(*p*) *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218, reversing the decision of Bacon, V.-C., 4 Ch. D. 639.

(*q*) Per Lord Redesdale, in *Jackson v. Innes*, 1 Bli. at p. 115.

(*r*) Per Lord Eldon, in *Ruscombe v. Hare*, 6 Dow. 1.

(*s*) *Clinton v. Hooper*, 3 Bro. C. C. 201.

(*t*) Per Sir J. Wickens, V.-C., in *Re Betton's Estate*, L. R., 12 Eq. 553. See also *Jones v. Davies*, 8 Ch. D. 205.

Wherever, therefore, the transaction, importing more than a Chap. IV. s. 6.
mere mortgage security, gives satisfactory evidence of an intention to effect a change of the beneficial interest—the husband and his heirs, and not the widow or her heirs, will be entitled to the equity of redemption (*u*).

The law on this subject was deeply considered and learnedly *Jackson v. Innes.*
discussed in the case of *Jackson v. Innes*, where the decree of Lord Eldon, in the Court of Chancery, was, on the motion of Lord Redesdale (and with the assent of Lord Eldon himself), reversed by the House of Peers. The following passages from Lord Redesdale's judgment furnish a complete summary of the previous law on this subject:—

It is highly important, in all cases, that the principles of decisions Remarks of
Lord Redesdale.
should be known and uniform, that professional persons may be able to advise with safety. In a case of this kind, a purchaser, acting under a misconception of his legal adviser, found that his title was deficient. That was the case of *Ruscombe v. Hare* (*x*), in which the doctrine of resulting trust was held applicable. In the present case, it is alleged that there is a distinct ground, *scil.*, of fraud, to annul the limitation to the husband. But no such ground is recognized by the decree, or established in evidence. The only question, therefore, which is now presented for the consideration of the House is, whether the decree is founded upon the principle which regulated former decisions, and was established by the judgment of this House, upon the appeal in the case of *Ruscombe v. Hare*.

The case of *Broad v. Broad* (*y*) was the first in which the doctrine was applied. In Eq. Ca. Abr. 62, it is laid down as a general principle, that where money is borrowed by husband and wife, upon the security of the wife's estate, although the equity of redemption by the mortgage deed is reserved to the husband and his heirs; yet the wife shall redeem, and not the heir of the husband; and for authority reference is made to the case of *Broad v. Broad*. According to the facts of that case, to be collected from the reports, T. B., the husband of the plaintiff in the suit, settled certain houses in Bread Street, London, to the use of himself for life, remainder to the plaintiff for life for her jointure. These houses were burnt down in the Great Fire in 1666. In order to rebuild them, the husband borrowed 600*l.*, and a fine was levied by husband and wife to the lender for ninety-nine years, who re-demised the premises to the husband for ninety-eight years, rendering 36*l.* per annum, and binding himself to repay the 600*l.* at a time, &c. The husband had agreed with the wife that she should have the redemption, paying the interest of the money borrowed. But when the houses were rebuilt, the husband

(*u*) *Jackson v. Innes*, 1 Bli. 104.

(*x*) 6 Dow. 1.

(*y*) Eq. Ca. Abr. 316, reported as *Brend v. Brend*.

Chap. IV. s. 6. settled them, among other lands, upon himself, in tail to the heirs male of his body—the remainder in tail to his brother (who was defendant in the suit), charged with portions of 3,000*l.* to his daughters. He died, making his brother, the defendant, his executor; and his personal estate was not sufficient to pay his debts. The defendant had executed a bond upon which he was liable as surety for his deceased brother to the amount of 1,600*l.*, which he satisfied, and also paid the interest of the 600*l.* borrowed, until 1681, when the plaintiff filed her bill, by which she prayed that she might redeem, paying proportionably, and hold over until she was repaid with interest. The defendant insisted that the premises, having been re-demised to his brother, were assets to pay his debts; and further, that the plaintiff's title was but a parol agreement between husband and wife; and that he (the defendant) had no notice of the agreement until the filing of the bill. It was decreed, that the plaintiff should have the redemption, paying a third part of the principal, but should have no profits received by the defendant until the filing of the bill in 1681, when he first had notice of the agreement. The decree, therefore, which was made upon the original hearing, proceeded entirely upon the foundation of the agreement. A bill of review having been afterwards filed, suggesting that the decree was founded upon a trust arising out of an agreement by the husband, and that the agreement was not mentioned in the decree, nor stated to have been proved,—Lord North, then Keeper, admitted the objection to the form of the decree, and said, that he took no notice of the agreement on that account, but affirmed the decree, because when the wife joined in the fine of her jointure, in order to [effect] a mortgage or security, it was not an absolute departing with her interest; but there resulted a trust for her when the mortgage was paid, to have her estate again, as if it had been a mortgage on condition, and the money paid at the day.

That was the first case in which the principle was established. It has ever since been adopted and referred to in all subsequent cases, up to the late decision in *Ruscombe v. Hare*. The rule fixed by those cases is no more than this,—where the equity of redemption is reserved to the husband, upon a mortgage of the wife's estate, and there is nothing more in the transaction, the Courts hold that no alteration of the previous rights of the parties is affected. But it is an exception to that rule, where other circumstances occur, affording evidence of an intended alteration of rights.

In *Rowell v. Whalley* (z) the wife joined with her husband in a mortgage of her lands, by a deed containing a proviso and declaration, that if the husband and wife, or either of them, or their heirs, executors, &c., paid to the mortgagee, his executors, &c., the sum borrowed, the fine to be levied according to a covenant contained in the deed should enure to the husband and wife, and the longest liver of them; with remainder to the right heirs of the husband for ever. Here is a case of a distinct declaration, in no manner depending upon the proviso for redemption, but defining the course in which the property is to be carried after the

satisfaction of the mortgage. A fine was afterwards levied, according to the agreement among the parties; and after the death of the husband, a bill to redeem was filed by the relict. The son and heir of the former husband, being a party defendant in the suit, was an infant. The Court decreed, that the plaintiff and the infant should proportionably pay what was due upon the mortgage at the time of the death of the mortgagor, rating the estate for the life of the plaintiff in the premises at one third, and the reversion in fee of the infant at two thirds. In that case it was determined that the subsequent declaration and limitation, having no connexion with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate. In the case now pending before us for judgment the distinction is stronger; for it is the mortgage term which is made redeemable by the husband and wife; and *the fee is the subject of the settlement.*

In the case of *The Earl of Huntingdon v. The Countess of Huntingdon* (a) the mortgage was made by the mother of the plaintiff joining with her husband, of lands being her inheritance; and the purpose was to raise money for the husband to pay for the place of captain of the Band of Pensioners. The mortgage was for a term of years, subject to which the estate was settled to the Countess (the plaintiff's mother) for life, remainder to the plaintiff in tail; the proviso for redemption being, that on payment of the mortgage money the term should cease. In 1683 the Countess joined with her husband in an assignment of the mortgage; and in the deed of assignment the proviso was, that on payment of the money borrowed by them, or either of them, the mortgage term was to be assigned as they or either of them should direct or appoint. The husband afterwards paid off the mortgage, and took an assignment of the term in trust for himself, and by will bequeathed his personal estate to his second wife (the defendant), who claimed the term. The plaintiff (son of the first wife) filed a bill in Chancery, praying that the term might be assigned to him. The Lord Keeper refused to make such decree, except upon the usual terms of a redemption, paying principal, interest, and costs; but upon appeal to Parliament (b) the decree was reversed; and the term directed to be assigned to the appellant, with an account of the profits from the death of the appellant's mother, making to the respondent just allowances for the maintenance of the appellant, and management of the estate. In that case, the limitation, after the life estate, was to the son in tail; and in the case now under discussion, it is to the husband and wife, and the heirs of their bodies; or, in default of issue, to the survivor of the husband and wife in fee; and that is the only difference in that respect between the cases. The proviso for redemption in the Earl of Huntingdon's case was, that on payment by either of them the term should be assigned as they or either of them

(a) 2 Vern. 437.

(b) 2 Bro. P. C. 1; Journals of the House of Lords, vol. xvii. p. 236.

Chap. IV. s. 6. should direct. Under these circumstances, the executrix and devisee of the husband insisted that, as he had paid the mortgage, and taken the assignment, it belonged to her as his representative. The son of the former wife contended, that the estate was under settlement, and bound by the terms of the settlement; that the husband and wife could not deal with the estate beyond their own interest: and it was held, as to the term assigned to the husband, and possessed under his will by the defendant, that there was a *resulting trust for the son*.

In the case of *Jackson v. Parker* (c), which was decided by Sir Thomas Sewell, a difficulty occurred of a different description. The husband had borrowed a sum of money, and in order to make a security, by mortgage of his own estate, his wife joined in a fine, which would have had the effect of barring her of any claim to dower. The limitation of the equity of redemption was to the husband and the wife, and their heirs; and there was a declaration in the deed, that, after payment of the money lent on the mortgage, the fine should enure to the husband and his heirs. Other charges were afterwards made upon the estate, and those subsequent charges were all made redeemable by the husband and wife, and their heirs. The husband by his will made a disposition of this property, in trust to raise provisions for all his children. But the will was disputed by the eldest son and heir-at-law, upon the ground, that it was a devise of the equity of redemption, of which the husband was not sole seised; because the equity of redemption was reserved to the husband and wife, and their heirs. Sir Thomas Sewell decided that upon a contest for redemption the Court would regard the ownership of the estate previous to the mortgage; and in that view the husband would be considered as the person entitled to redeem, the wife being entitled to redeem only in respect of her interest, which would have been only a right to dower, if she had survived her husband. In such case she would have been entitled to have had the estate redeemed for the purpose of letting in her dower; but there her right ended. In that case it was argued, "That the Court will put a true construction on the deed, by taking into consideration the ownership of the estate, and the purpose for which the deed was made. The husband was the owner of the estate, and the intention of the deed was merely to make a mortgage, and the wife was made a party and joined in the fine, for the sake of the mortgagees." And this argument was adopted by the judgment.

In the case of *Corbett v. Barker* (d), according to the report, the Court do not seem to have had the least notion that there existed a resulting trust, such as the House of Lords held to exist in the case of *Ruscombe v. Hare*; and they dismissed the bill. In that case, it appears probable that Baron Thomson doubted the correctness of the decision; for he says, "That a reservation of the kind now under discussion, in a fine levied completely *diverso intuitu*, shall not, without an express declaration of such an intention, carry the estate in a new channel." The cause being afterwards reheard, the Court seems to have been of opinion, that a trust resulted in favour of the original owner of the estate, and determined

(c) Amb. 687.

(d) 1 Anstr. 138.

accordingly. The report of the case is so very imperfect in its language and statements, that it is difficult to discover what were the facts of the case, and the point decided; but, as far as they can be collected, the case appears to have been of the same nature as *Broad v. Broad*, and the other cases which have been decided upon a similar principle. Chap. IV. s. 6.

It must be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity; that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case. But here, it seems to me that the operation of the deed as to the mortgage term, and the operation of the deed as to the limitation of the fee, are wholly distinct, and do not in any way depend on each other. The question does not arise upon the interpretation of the proviso for redemption; but it arises upon a distinct and subsequent clause of the deed. The term and the fee are kept distinct in the deed. The term is a security for the repayment of the money lent; and when the mortgage should be discharged the intention of the maker of the deed was, that the term should be completely at an end. The way in which they proposed to effect this was, by declaring that, upon payment of the money due, the term should cease. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating upon the property. But there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The term being at an end, the operation of the deed, so far as it declared the limitations of the estate, subject to the term, remained perfectly distinct, and had no connection whatsoever with the existence of a term, which then would have ceased to exist. A Court of Equity will so deal with a declaration that upon payment of a sum of money on a given day the term shall cease, that, although the term becomes absolute by nonpayment of the money at the day, it is still subject to redemption. By whom it may be redeemed must be discovered from the title, which by the deed itself is declared to be in the husband and wife, for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. Upon the declarations, therefore, and the provisions of that deed, the redemption would arise by implication, in case the money was not paid at the day. The implication must be drawn from the deed itself declaring who were the persons entitled to the estate.

In all the cases decided upon the general principle, the grounds of the decision were, "that the mode in which the redemption was limited, was by mistake or improper contrivance introduced into the deed." But in this case, there is no ground to raise such imputations. For the deed is clear and express in its declarations and provisions. The case is really in

Chap. IV. s. 8. principle, if not in circumstances, the same as the case of *Rowell v. Whalley*.

Upon these grounds it appears to me that the part of this decree which declares that the appellant was a trustee of the equity of redemption is not according to law. I shall move simply to reverse this decree.

Lord Eldon's
remarks.

The Lord Chancellor Eldon.—The circumstances of this case are certainly, in point of fact, much better understood than they were; and much greater research has been made into cases, so as to bring before the consideration of the House the true principle of decision. The Court below did not rightly apprehend the case, as it now appears. The judgment of this House will remove a difficulty, which I know is floating in the minds of many persons. I conceive it to have been the opinion of Lord Thurlow, that, in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be in the recitals of the instrument some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to leave the wife to understand what those limitations were. It does, however, occur to me, on looking into the cases which have been referred to, that such a proposition cannot be supported; and, therefore, I am of opinion that the decree must be reversed.

Decree reversed accordingly (e).

Reeve v. Hicks. In *Reeve v. Hicks* (f), Sir John Leach held that a widow was entitled to redeem her copyholds which had been charged

(e) The case of *Jackson v. Innes* is remarkable as being the only instance in which a judgment of Lord Eldon's was reversed. Great as that lawyer unquestionably was, the preceding exposition will convince one that he did not enjoy without a rival the eminence which was unquestionably his due. Lord Redesdale, after having discharged the judicial duties of the Great Seal in Ireland with consummate ability for a period of four years, retired on the appointment of the Whig ministry in 1806. There was nothing odd in this. But when his friends returned to power, in 1807, the odd thing was, that they kept Lord Redesdale at home without office, and sent Lord Manners in his stead to be Chancellor of Ireland. The subsequent years of his life (a very long one) were, however, not lost to

the profession. He sat regularly in the House of Peers, advising their Lordships on all appeals and writs of error, and other judicial business. In learning, it is hard to say that he was not equal to Lord Eldon. He had powers of exposition too; and excelled as a legal writer. In the judgments of Lord Redesdale we see general rules luminously descanted upon; for this great master of equity had a just confidence in himself, and never frittered away his meaning by timid and dexterous qualifications. He committed himself generously and boldly to all his propositions, for he knew and felt that they had a foundation of granite. Herein lay his superiority over Lord Eldon, who scarcely ever tied himself down to anything beyond the decision of the particular case before him.

(f) 2 Sim. & Stu. 403.

during the coverture; but with respect to her freeholds, which Chap. IV. s. 6. had been also charged on the same occasion, the circumstances were as follow, namely—that the husband and wife had mortgaged them for a thousand years, reserving the power to redeem to them or either of them; and they likewise covenanted to levy a fine to the mortgagee for the term, and, subject thereto, to *the husband and his heirs and assigns for ever*. A fine was duly levied pursuant to the covenant; and the husband subsequently released his equity of redemption to the mortgagee in fee, who entered into possession. His Honor observed that “the case was not distinguishable in principle from that of *Jackson v. Innes*. The limitation of the uses of the fine had no connection with the purposes of the mortgage, or the proviso of redemption, *but was altogether a new settlement*.” The widow, therefore, was not allowed to redeem, for she had by her own act, and in a legal manner, not merely mortgaged her estate for her husband’s debt, but actually transferred the entire beneficial interest out and out from herself and her heirs to her husband and *his* heirs; a result which the Court will in general be reluctant to admit, but which it cannot in the face of strong acts and expressions exclude; for there is no reason in law or equity why a wife should not, if so minded, convey her estate to her husband (*g*).

The widow has also a right in equity to have her estate exonerated out of her husband’s assets. This equity is put upon the principle that she is considered, when mortgaging her property for her husband’s debt, to stand in the attitude of a *surety*; from whence it follows that she must be invested with the usual privileges of that character,—the first of which is indemnity from the principal for whose benefit her security was interposed. Wife’s equity to exoneration.
Treated as a surety.

Thus we have it laid down by Lord Hardwicke with his accustomed clearness, that

It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband. After his death she is entitled to have her real estate exonerated out of his personal and real assets; the Court considering her estate only as a surety for his debt (*h*).

(*g*) See *Eddleston v. Collins*, 3 De G., M. & G. 1; *Heather v. O’Neil*, 2 De G. & J. 399; *Atkinson v. Smith*, 3 De G. & J. 186. (*h*) *Robinson v. Gee*, 1 Ves. sen. 251. See also remarks of Lord

Chap. IV. s. 6.

She is entitled to stand in the place of the mortgagee.

Husband's other creditors have no preference over her.

The same great judge, in *Parteriche v. Poulet* (i), says that the wife, paying her husband's mortgage debt by way of loan, she having separate estate, must be considered as a distinct person, and is equally entitled to stand in the place of the mortgagee as a stranger; adding, also, that if she joins with him in charging her estate, she is, if she survives him, entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate. Hence it follows, as indeed Lord Hardwicke declared in *Robinson v. Gee* (k), already cited, that the other creditors of the husband cannot stand in the place of the mortgagee against her (l). So that they are entitled to no preference over her in the administration of his assets.

If the money was borrowed for the benefit of the wife, she will not be entitled to her equity of exoneration (m).

Scholefield v. Lockwood.

In *Scholefield v. Lockwood* (n), husband and wife having a joint power of appointment over an estate the ultimate limitations of which, in default of appointment, were to the use of the husband and wife in moieties in fee, executed the power by way of mortgage to secure the husband's debt; it was held by Lord Westbury, C., affirming the decision of Sir J. Romilly, M. R., that this was no mortgage of the wife's estate, and consequently that she was not entitled to have her moiety exonerated out of the estate of the husband.

Camden in *Kinnoul v. Money*, 3 Swanst. 202, n., at p. 217; *Hudson v. Carmichael*, Kay, 613.

(i) 2 Atk. 384. See, however, *Ferguson v. Gibson*, L. R., 14 Eq. 379.

(k) Ubi supra.

(l) The words of Lord Hardwicke are: "None of his (the husband's) creditors have a right to stand in the place of the mortgagee to come round on the wife's estate." Upon the bankruptcy of the husband, the wife after she has paid the debt, is entitled to go in as a creditor upon

her husband's estate in bankruptcy, and there with his other creditors to receive a dividend. Per Lord Westbury, C., in *Gleaves v. Paine*, 1 De G., J. & S. at p. 96; see White & Tudor's Leading Cases, 5th ed. Vol. 2, p. 1038.

(m) *Earl of Kinnoul v. Money*, 3 Swanst. 202, n.; *Clinton v. Hooper*, 1 Ves. jun. 173; see also *Thomas v. Thomas*, 2 K. & J. 79.

(n) 4 De G., J. & S. 22. See also *Heather v. O'Neil*, 2 De G. & J. 399; *Jones v. Davies*, 8 Ch. D. 205.

CHAPTER V.

LIABILITIES ARISING FROM THE DISSOLUTION
OF THE MARRIAGE BY THE DEATH OF THE
HUSBAND.

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As a general rule it would appear that the widow is not bound to bury her deceased husband, an obligation which seems with more reason and justice to fall on the husband's representative (a). "The law," said Mr. Justice Kay in a recent case (b), "is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried."

It has been held, however, by the Court of Exchequer (c), that a widow who was also an infant, might bind herself by contract for the expense of her husband's interment. This conclusion (arrived at by an exercise of judicial ingenuity, which may be thought not entirely to have overcome the difficulties of the subject) proceeded on the ground, that the decent burial of the deceased husband should be construed to be a benefit and comfort to his surviving and sorrowing widow; and therefore that the case should be regarded as coming within the rule of law, which makes the contract good where the infant is

(a) See *Tugwell v. Hayman*, 3 Camp. 298; *Rogers v. Price*, 3 Y. & J. 28.

(b) *Williams v. Williams*, 20 Ch. D. 659.

(c) *Chapple v. Cooper*, 13 Mee. & Wel. 252.

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a gainer by it. After holding that an infant husband could contract for the burial of his deceased wife, she being *persona conjuncta* with him, and her interment being a personal benefit to him, the Court said—"If this be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end; and so she may contract, and her infancy is no defence if the contract be for her personal benefit."

Revival of wife's liabilities.

During marriage, the wife was formerly protected by her coverture from being sued in respect of debts contracted by her *dum sola* (*d*); unless, indeed, she had separate property. When, however, her coverture was put an end to by the death of her husband, she again became subject to a demand for those debts which, having been contracted by her before marriage, had remained undischarged and unsatisfied during the coverture (*e*).

Ante-nuptial debts.

There seems to be no doubt that this is still law, and that a widow can be sued in respect of debts contracted by her previously to her marriage (*f*). It also seems reasonably clear that where a woman, married since the 31st December, 1882, has incurred liabilities during marriage, she will remain liable after the death of her husband, not only to the extent of what was her separate property during the coverture, but also in respect of any property which she may have acquired after the dissolution of the marriage by the husband's death. It is true that the Act of 1882, in the cautious terms with which it endows married women with capacity, falls short of declaring in so many words that they may contract and become liable for debts. It seems to aim rather at constructing a new kind of statutory obligation, enabling a married woman indeed to contract debts, but rendering them enforceable only against her separate property, and not against herself as possessor of the property.

Property liable under the Act of 1882.

(*d*) See ante, p. 72.

(*e*) *Mitchinson v. Hewson*, 7 T. R. 348; *Woodman v. Chapman*, 1 Camp. 189.

(*f*) A husband is not liable after the death of his wife under the Married Women's Property Act,

1874 (37 & 38 Vict. c. 50), or at common law for her ante-nuptial debts (*Bell v. Stocker*, 10 Q. B. D. 129); *secus*, under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 14, 15.

But such a construction of the statute would lead to the conclusion, that the death of the husband operated as a release of the wife's obligations contracted during the coverture; for after the termination of the marriage, "separate property" must necessarily cease to exist, and by the first section of the Act the contracts of the wife are expressly limited to that species of property.

Under the law, indeed, prior to the Act of 1882, the debt being considered as contracted with express reference to the then existing separate property, neither the death of the husband, nor the subsequent acquisition of property, increased the fund which the creditor might render available (*g*); but it is conceived that that statute places the wife in a different position, and that a judgment recovered against a widow in respect of a debt contracted during marriage, may be enforced against all her property, and not merely against such part of it as was separate property when the debt was contracted.

Where, before the recent Act, a married woman was an executrix or administratrix, and the assets were wasted during the coverture, the estate of the husband after his death was chargeable with the devastavit, and the surviving wife was also liable, if the estate of the husband was insufficient (*h*). These liabilities are modified by the 24th section of the Act of 1882 (*i*), which provides that the word "contract" as used in the Act, shall include the acceptance of any trust, or of the office of executrix or administratrix, and that the provisions of the Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and that her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration.

It would, therefore, appear that, when a married woman has since the 31st December, 1882, proved a will, or taken out letters

(*g*) *Pike v. Fitzgibbon*, 17 Ch. D. 454, and cases cited.

(*h*) *Adair v. Shaw*, 1 Sch. & Lef. 243, where the subject is elaborately

discussed by Lord Redesdale. See also *Soady v. Turnbull*, L. R., 1 Ch. 494.

(*i*) 45 & 46 Vict. c. 75.

Chap. V. of administration, and has committed a devastavit, she alone will be liable, and not the estate of the husband, unless he has acted or intermeddled in the trust (*k*).

Liability for torts. After the death of her husband, the widow may be sued alone for all tortious acts in which she participated, whether she was a sole actor in them; or whether they were committed by her at the instigation or under the influence and direction of her husband (*l*).

(*k*) See *In the goods of Ayres*, 8 P. D. 168.

(*l*) *Vine v. Saunders*, 4 Bing. N. C. 96.

CHAPTER VI.

RIGHTS ARISING FROM THE DISSOLUTION OF
THE MARRIAGE BY THE DEATH OF THE
WIFE.

SECTION I.

THE HUSBAND'S RIGHT OF ADMINISTRATION.

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ON the death of the wife intestate, the Probate Division of the High Court will grant administration of her estate to her husband, and to him alone, unless he renounce or decline it.

Ch. VI. s. 1.

Husband's
right of admi-
nistration.

Mr. Justice Williams, in his valuable work on Executors and Administrators, lays down the law as follows (a):—

This right (the husband's right of administration to the wife) belongs to the husband exclusively of all other persons (b); and the Ordinary has no power or election to grant it to any other (c). The foundation of this claim has been variously stated: by some it is said to be derived from the statute 31 Edw. 3, on the ground of the husband's being "the next and most lawful friend" of his wife (d); while there are other authorities, which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes (e). But the right, however founded, is now

(a) 8th ed., vol. i. 416.

(d) 3 Salk. 22; *Elliott v. Gurr*, 2(b) *Humphrey v. Bullen*, 1 Atk.

Phillim. 16.

459.

(e) Com. Dig. Administrator (B.

(c) *Sir George Sand's case*, 3 Salk.6); *Watt v. Watt*, 3 Ves. 247.

22.

Others have supposed that the hus-

Ch. VI. s. 1.

unquestionable, and is expressly confirmed by the statute 29 Car. 2, c. 3, s. 25, which enacts that the Statute of Distribution (22 & 23 Car. 2, c. 10) "shall not extend to the estates of *femes covert*, that shall die intestate, but that *their husbands may demand and have administration* of their rights, credits and other personal estates, and recover and enjoy the same as they might have done before the making of the said act."

Wife's power
of appointing
an executor.

Although the husband was thus entitled to administer to his deceased wife, this right might have been displaced as to separate property by the appointment of an executor by the wife (*f*). But it seems that the probate granted to the executor was always limited to the separate property, and that a *ceterorum* grant would in all cases be made to the husband.

It can scarcely be said that any one except the husband, or some one administering with his consent, became, previously to the recent Act, the personal representative of a married woman. Accordingly, it has been held that the will of a married woman made under a power and appointing executors did not continue the chain of representation from a former will, of which the married woman was executrix (*g*). But if the husband (*h*), or the executor of the married woman with his consent (*i*), supplements the limited probate, by obtaining a grant of administration to the rest of her personal estate, such person will be entitled to take out administration with the will annexed of the unadministered personal estate of the original testator (*k*).

Personal
representative
of wife since
Act of 1832.

A question of considerable importance arises under the recent Act (*l*) with reference to the husband's right to administration, namely: whether, if a married woman appoints an executor, he is her personal representative to all intents and

band is entitled, as next of kin to the wife; *Fortre v. Fortre*, 1 Show. 327; *Rex v. Bettesworth*, 2 Stra. 1111, 1112; but it seems clear that the husband is not of kin to his wife at all; *Watt v. Watt*, 3 Ves. 244.

(*f*) *Brownrigg v. Pike*, 7 P. D. 61. A will made by a married woman under a power stood on a different footing from one which disposed of separate property. The former, even when executors were appointed thereby, was not admitted to pro-

bate; *O'Dwyer v. Geare*, 1 Sw. & Tr. 465; *In the goods of Tomlinson*, 6 P. D. 209.

(*g*) *In the goods of Hughes*, 4 Sw. & Tr. 209.

(*h*) *In the goods of Martin*, 3 Sw. & Tr. 1.

(*i*) *In the goods of Richards*, L. R., 1 P. & D. 156.

(*k*) *In the goods of Ditchfield*, L. R., 2 P. & D. 152; *In the goods of Bridger*, 4 P. D. 77.

(*l*) 45 & 46 Vict. c. 75.

purposes, so as to displace altogether the husband's right to obtain a grant of administration? Closely connected with the subject of administration, is the further question—whether the beneficial interest in the wife's property, with respect to which she may have died intestate, has been to any extent affected in its devolution by the Married Women's Property Act, 1882? These questions are discussed in a subsequent chapter, and reference to them is made here merely for the purpose of guarding against the supposition that the recent Act has necessarily altered the old law (*m*).

Ch. VI. s. 1.

It would appear that it was only where there were choses in action of the wife unrecovered at her death, or chattels real belonging to her which were not vested in his possession in her right in her lifetime, that the husband could gain any object by taking out administration to her (*n*). For formerly all her other personal property passed to the husband by virtue of the marriage—that is, *jure mariti*. So that even where the wife's property consisted of a vested reversionary interest in leaseholds subject to a life estate, and she predeceased her husband during the subsistence of the life estate, it was not necessary for the husband to take out administration to her in order to complete his title to the property (*o*).

On the death of the wife, her choses in action not reduced into possession belonged to the surviving husband, but in order to recover them, it was necessary that he should take out administration to her estate. This would seem to be still the law in all cases of the death of a married woman intestate, where the choses in action have not been disposed of by her. Where a female creditor having taken out administration to her deceased debtor, married and died without having appropriated a fund for the payment of her own debt, it was held that the husband was not entitled in his own right as a creditor, but only as the representative of his wife (*p*); and after the death of the sur-

Husband's right to wife's choses in action on her death.

(*m*) See *post*, Chapter on Recent Legislation.

(*o*) *Re Bellamy*, 25 Ch. D. 620.

(*n*) *Williams on Executors*, 8th ed. p. 701.

(*p*) *In the goods of Risdon*, L. R., 1 P. & D. 637.

Ch. VI. s. 1. living husband a double administration is necessary before recovering the outstanding chose in action (*q*).

Husband's
rights after
death of his
wife.

The character in which the husband was entitled to the property of his deceased wife was not affected by its being settled to her separate use. If such property was stock or any other chose in action, the husband could, of course, recover it only as administrator (*r*); if it was such that, except for the separate use, it would have vested in him *jure mariti*, he was entitled after her death to recover it without taking out letters of administration, because "the quality of separate property ceased at her death" (*s*).

Although by the Married Women's Property Act, 1882, the marital right during the coverture has been abolished, yet those rights of the husband, which arise on the death of the wife, do not seem to be affected by it. The enactment before referred to (29 Car. II. c. 3, s. 25) has not been repealed, and therefore the husband's right to administration is not taken away; and the only result seems to be that the husband must now in all cases take out letters of administration to his wife.

It would seem that property received by the husband in this his representative character, as administrator of his wife, was liable to her debts; whereas property acquired by him *jure mariti* was his absolutely. But this artificial distinction has now ceased to have any practical operation; for, since the 31st December, 1882, no property of the wife can be acquired by the husband during the coverture *jure mariti*, except in the few cases where the title has accrued before that date; and any property of the wife which may pass at her death to her husband will now reach his hands subject to the same liability for her debts as it was subject to during her life (*t*).

If the wife be executrix to another and dies intestate, then, as to the goods which she had in that capacity, administration

(*q*) *In the goods of M. A. Harding*,
L. R., 2 P. & D. 394.

(*r*) *Proudley v. Fielder*, 2 My. &
K. 57.

(*s*) *Johnstone v. Lumb*, 10 Jur.
699; *Molony v. Kennedy*, 10 Sim.
254.

(*t*) Married Women's Property
Act, 1882 (45 & 46 Vict. c. 75).

must not be granted, generally speaking, to her husband (u); Ch. VI. s. 1.
 but in order to constitute a personal representative of the original testator administration *de bonis non* must be taken out with his will annexed (x).

Where a wife has obtained a protection order under the 20 & 21 Vict. c. 85, s. 21, and afterwards dies in the lifetime of her husband, intestate, the Court will decree administration, limited to such personal property as she acquired since the desertion, to the next of kin of the wife, and not to the husband, the 25th section of the Act having expressly provided that on the death of the wife such property "shall go as if her husband had been then dead" (y).

SECTION II.

HUSBAND'S RIGHT TO ARREARS OF RENT OF WIFE'S ESTATE.

Before the 32 Hen. 8, c. 37, if a husband did not, during Ch. VI. s. 2.
 the coverture, recover arrears of rent which had become due to his wife before the marriage, he could not after her death compel payment of them. This was an inconvenience; and was remedied by that Act, which gave the husband and his executors and administrators an action of debt for such arrears, with liberty to distrain for the same in like manner and form as if his wife were still living (z). This has ceased to be of any importance, as, since the Married Women's Property Act, 1882 (a), the husband takes no interest in his wife's real estate during the coverture.

(u) Williams on Executors, 8th ed., p. 421; *Smith v. Jones*, Bulst. 44; *Jones v. Roe*, W. Jones, 175; *Anon.* 3 Salk. 21.

(x) *In the goods of Ditchfield*, L. R., 2 P. & D. 152; *In the goods of Bridger*, 4 P. D. 77.

(y) *In the goods of Worman*, 1 Sw. & Tr. 513; *In the goods of Faraday*,

2 Sw. & Tr. 369; *In the goods of Stephenson*, L. R., 1 P. & D. 287; *Mudge v. Adams*, 6 P. D. 54.

(z) Co. Litt. 351, b; Com. Dig., 4th ed., tit. "Bar. and Fem.," p. 84; 1 Rep. 206; *Howe v. Scarrott*, 4 H. & N. 723.

(a) 45 & 46 Vict. c. 75.

SECTION III.

TITLE BY THE CURTESY.

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Ch. VI. s. 3.

Curtesy initiate.

On the birth of issue capable of inheriting the wife's real property, the husband, as the father of such issue, acquires, in his own right, an estate for life, called tenancy by the curtesy initiate; which estate, however, does not become consummate till the death of the wife.

Though incident to the birth of inheriting issue, not liable to be defeated by the death of such issue.

Tenancy by the curtesy initiate, though thus called into being by the birth of issue capable of inheriting, is not liable to be determined by the death of such issue, or even by such issue attaining majority.

Requisites of tenancy by the curtesy.

On the death of the wife the husband becomes tenant by the curtesy, or, as Littleton says: "tenant by the curtesy of *England*, because this is used in no other realm but in *England* only" (b).

Four things are requisite in order to give rise to a tenancy by the curtesy, namely, marriage, seisin of the wife, issue who might inherit the land, and the death of the wife (c). Of these, the seisin of the wife is the only one which calls for observation.

Seisin of the wife.

The seisin must be an actual seisin when attainable; but if, from the circumstances of the case, possession is not possible, a seisin in law is sufficient (d). Thus, if a rent in fee descends to a married woman who dies before any payment falls due, the

(b) Litt. § 35. Littleton's statement that the custom was peculiar to England is incorrect. It existed at an early period both in Germany and in France, and was probably in its present form introduced by the Normans. See Digby's History of

the Law of Real Property, p. 122.

(c) Co. Litt. 30, a.

(d) Co. Litt. 29, a. And see as to the difference between seisin in law and seisin in deed, *Leach v. Jay*, 6 Ch. D. 496; 9 Ch. D. 42.

husband shall be tenant by the curtesy, although his wife had but a seisin in law, because, says Lord Coke, "he could by no industry attain to any other seisin, *et impotentia excusat legem*" (e).

Ch. VI. s. 3.

The doctrine of seisin at law received in a recent case (f) a remarkable extension, for it was there held that the husband was entitled as tenant by the curtesy of an estate devised to his wife by her father, although she died in the testator's lifetime, and her existence was artificially continued by the 33rd section of the Wills Act, so as to prevent a lapse.

The following statement of the law is taken from the judgment of Sir G. Jessel, M. R. :—

"Now, I consider it as settled law that, as a general rule, the husband could not take an estate by the curtesy in property which was the fee simple of the wife in possession, unless there had been an entry, or something equivalent to an entry—that is, a reception of rent to entitle the wife to be described as being seised in fee of the property. If it descended to the wife, for instance, and the husband did not enter in her right before her death, the husband did not get an estate by the curtesy; but, though that was settled law, there was a reason for the law—it was considered to be the husband's own fault for not entering. He had an estate during the coverture, and he had not taken due advantage of his opportunities of becoming seised; and, when he could not become seised from the nature of the estate, a seisin in law was sufficient, and he was not therefore deprived of his estate by the curtesy, because he could not possibly have obtained a legal [*sic*] seisin by any act of his own" (g).

The seisin must also be sole; if the wife is a joint tenant the husband will not be entitled; *secus*, where she is a tenant in common, for then she is solely seised of an undivided share.

Her interest must also be in possession, "a man shall not be tenant by the curtesy of a remainder or reversion" (h). The inchoate right to curtesy does not attach till the wife becomes entitled to an estate of inheritance in possession; and, accordingly, it has been held (i) that, "where the wife's real estate did not fall into possession till after the husband's bankruptcy and discharge, the husband, though there had been issue of the

Interest must be in possession.

(e) Co. Litt. 29, a.

(h) 2 Black. Comm. 127.

(f) *Eager v. Furnivall*, 17 Ch. D. 115.

(i) *Gibbins v. Eyden*, L. R., 7 Eq. 371.

(g) 17 Ch. D. 119.

Ch. VI. s. 3.

marriage, had not, at the time of his bankruptcy, any such contingent interest in the estate as would pass to his assignees."

Curtesy out
of estates for
separate use.

It was said by Sir G. Jessel, M. R., that:—

"In the case of a husband, this being a devise of legal estate, with a superadded direction as to separate use which does not affect the devise of the legal estate, the husband would take under his legal rights without those legal rights being cut down by the superadded direction as to separate use" (*k*).

It may be considered as settled that, where a married woman was entitled to an equitable estate of inheritance to her separate use, and did not dispose of it by deed or will, her husband became, on her death, tenant by the curtesy (*l*); whether the legal estate was vested in trustees, or in the husband, in right of or as a trustee for his wife, equity, following the law, held the husband "to be entitled to curtesy out of the wife's equitable estate"; but it remains to be decided whether the separate property of a married woman, under the Married Women's Property Act, 1882, is liable to all the same incidents, including curtesy, as property settled to her separate use under the law prior to that Act.

Curtesy since
Act of 1882.

As, however, under the law prior to the Married Women's Property Act, 1882, the husband was entitled to curtesy out of property in which he had no interest, legal or equitable, that is, out of the wife's equitable estate of inheritance, it seems reasonable to infer that in the case of separate real property under the Act, where both legal and equitable estates are in the wife, the mere fact that the wife is now clothed with the legal estate separate from her husband, in addition to the equitable estate, will not alter his right to curtesy. At the same time it may be argued that an entirely new species of property has been created by the Act, property in which the husband takes no interest whatever by the marriage, and that it is not liable to the incident of curtesy.

(*k*) Per Sir G. Jessel, M. R., in *Eager v. Furnivall*, 17 Ch. D. 119.

(*l*) *Roberts v. Dizwell*, 1 Atk. 607; *Morgan v. Morgan*, 5 Mad. 408; *Follett v. Tyrer*, 14 Sim. 125; *Appleton v. Rowley*, L. R., 8 Eq. 139;

Cooper v. Macdonald, 7 Ch. D. 288, overruling the inconsistent cases of *Hearle v. Greenbank*, 3 Atk. 696, 715; and *Moore v. Webster*, L. R., 3 Eq. 267.

A tenant by the curtesy has all the rights and liabilities of an ordinary tenant for life, and he is expressly empowered by the Settled Estates Act, 1877 (*m*), to grant leases for twenty-one years, subject to the conditions specified in the Act; and by the Settled Land Act, 1882 (*n*), all the large powers conferred thereby upon tenants for life are attributed to tenants by the curtesy.

Ch. VI. s. 3.

Powers of tenant by the curtesy.

CHAPTER VII.

LIABILITIES ARISING FROM THE DISSOLUTION OF THE MARRIAGE BY THE DEATH OF THE WIFE.

A HUSBAND is legally bound to bury his deceased wife (*o*), and is liable to a stranger who has paid the expenses of her funeral, the same having been suitable to the rank and fortune of her husband (*p*).

Chap. VII.

Husband's liabilities.

An infant husband can contract for the funeral of his deceased wife (*q*).

If the debts of the wife contracted *dum sola* are not enforced during her coverture, the husband was not, prior to the Act of 1882, liable for them after her death (*r*); but now he is liable to the extent of all property he may acquire through her (*s*).

(*m*) 40 & 41 Vict. c. 18, s. 46.(*q*) *Heard v. Stanford*, 3 P. Wms.(*n*) 45 & 46 Vict. c. 38, s. 58.409; *Lewis v. Nangle*, Amb. 150.(*o*) *Bradshaw v. Beard*, 31 Law J., C. P. 273.(*r*) *Bell v. Stocker*, 10 Q. B. D.(*p*) *Jenkins v. Tucker*, 1 H. Black. 91.

129. See also Chapter on Recent Legislation.

(*s*) 45 & 46 Vict. c. 75, ss. 14, 15.

CHAPTER VIII.

RIGHTS ARISING FROM THE DISSOLUTION OF
THE MARRIAGE BY DIVORCE, OR BY THE
JUDICIAL SEPARATION OF HUSBAND AND
WIFE (a).

SECTION I.

THE LAW OF DIVORCE.

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Ch. VIII. s. 1. IN the Catholic ages marriage was considered a sacrament.

The ancient ecclesiastical doctrine of the indissolubility of marriage.

Consequently no human authority could rescind it, unless, perhaps, the Pope, as God's vicegerent upon earth, had the power of dissolution—a power which he but rarely, if ever, exercised. The law of divorce, therefore, in this island, as in the rest of

(a) The opening portion of this chapter as printed in the first edition of this work (published in 1849) has, with some few trifling alterations, been retained, since it may

still be of some historical interest, though no longer having any practical bearing on the present law of divorce.

Europe, acknowledged throughout the cardinal doctrine of indissolubility. Ch. VIII. s. 1.

To set aside a marriage in those times, proof must have been given that the contract itself was invalid. Conjugal infidelity furnished a ground for separation. But nothing short of death could release the nuptial bond. The course, therefore, was to assert some obstructing, antecedent impediment, as a previous betrothment, undue consanguinity or affinity, physical incompetence or mental incapacity. Any one of these points established, the marriage was thereupon declared null *ab initio*. But if originally valid, it was, under all circumstances, positively and absolutely indissoluble. The hardship of such a state of things would have been great, or rather, would have been intolerable, were not the Catholic tribunals, we are well assured, in general very liberal and indulgent in their construction of legal impediments to matrimony. Every one knows how much it was the policy of the Roman church to multiply these impediments; the power of dispensation having been for many centuries a fruitful source of ecclesiastical revenue. To this end the spiritual lawyers—the canonists—invented many ingenious fictions, distinctions, and refinements, which made it in most instances no very difficult matter to annul a marriage. The most remarkable of all their contrivances in this kind was that by means of which the legitimate impediments of consanguinity and affinity were extended to an almost ludicrous extreme. For not only did they forbid marriage with a seventh cousin, but they held that the relation of affinity might be contracted by mere commerce between the sexes. And having once established this position, they deduced from it many startling conclusions. Thus, if a man had carnally known one sister, it would have been incest in him to marry or to have sexual intercourse with the other sister, or even with any of her relations to the seventh degree; because, said the canonists, an affinity resulted from the commerce with the first sister, which affected all her relatives standing within the scope of the seven prescribed degrees. Fornication, therefore, according to these authorities, was as much the creator of affinity as matrimony itself. In proof of which assertion we may refer to the notable case of Margaret,

Maxims of the
canonists.

Ch. VIII. s. 1. widow of James IV. of Scotland (*b*), who, after the king's death, having intermarried with Lord Methven, attempted to get rid of that nobleman by a sentence of the Ecclesiastical Court, on the ground that before the marriage she had been (as the record expresses it) *carnaliter cognita* by her husband's eighth cousin (*c*), the Earl of Angus. And to the same effect is the case of Henry VIII. and Anne Boleyn. For when the father of the English Reformation invoked the aid of the spiritual court to divorce his second wife, he did so, not on the ground of her alleged adulteries, but on the ground of two distinct canonical impediments, namely, her pre-contract with Northumberland, and his own pre-intercourse with her sister Mary, whom, we are told by Catholic writers, the first Defender of the Faith had maintained for years as his concubine. Attempts have been made to vindicate Henry from this stain upon his memory. The story of his connection with Mary Boleyn is denied by all good Protestants. But whether true or false, it serves to throw light upon the point now under consideration; and shows that the institutions of the canon lawyers ministered well to the passions of any husband who might happen to combine the characteristics of a libertine and a tyrant. In fact, parties who sighed for their liberty did not often, in those days, sigh in vain; for wherever a marriage became hateful to one or other, or both, of the spouses, the canonists rarely failed to demonstrate that it was invalid; the only proof required by the Court being the mere confession of the parties (*d*). Yet these impediments, with the long train of sublimated subtleties which attended them, were not always oppressive to the laity. They were occasionally found to be a real accommodation and convenience. Thus, in cases of adultery, the injured party had no more stringent remedy than divorce *à mensâ et thoro*—a sort of insult rather than a satisfaction to any man of ordinary feelings and under-

Facility of
divorces by the
canon law.

(*b*) Riddell's Scots' Peerage Law, p. 187.

(*c*) Quarterly Review, June, 1851.

(*d*) The statute 32 Hen. 8, c. 38, speaking of the canonistic devices, states in its recital, "that no mar-

riage could be so surely knit and bounden, but it should lie in either of the parties' power to prove a pre-contract, a kindred and alliance, or a carnal knowledge, to defeat the same."

standing. But if by the fertile exercise of canonical ingenuity Ch. VIII. s. 1. some ante-nuptial disability could be suggested, complete redress would be given; for the contract would be pronounced invalid, and both parties would then have their freedom. The labours of the canonists, therefore, in this department, ought not to be the subject of indiscriminating censure, since, by means of them, the community was in a great degree relieved from the severe and unbearable consequences, which would otherwise have sprung from an undeviating adherence to the iron doctrine of indissolubility.

Such was, and perhaps still continues to be, the Roman Catholic system of divorce *à vinculo matrimonii*; a system objectionable and mischievous in many ways, but chiefly so in this, that it almost invariably did something essentially different from that which it professed to do. For while the true object in most cases was to *rescind*, the avowed object in all was to *annul* the matrimonial contract; thus effecting covertly and indirectly a purpose which, when sought on proper grounds, required no disguise, being at once reasonable in itself, and unequivocally permitted, if not actually enjoined, by Divine authority.

At the Reformation, marriage ceased to be regarded as a sacrament, and the doctrine of indissolubility fell speedily to the ground. It had, in fact, no support either in the Old Testament or in the New. The restrictions of consanguinity and affinity, when pushed to the absurd extreme which has just been pointed out, were likewise found to be unwarranted by anything contained in the Sacred Writings. And it was agreed that there ought to be no prohibition of matrimony beyond the limits of God's law, as unfolded in the 18th chapter of Leviticus; while, on the other hand, all marriages *within* those sacred boundaries were adjudged incestuous and illegal, and utterly above the reach of ecclesiastical dispensation (e).

In this state of public opinion, it became necessary to institute a general revision of our ecclesiastical code, with which Revision of our ecclesiastical code. view an Act was passed in 1533 (f), authorizing Henry VIII.

(e) 32 Hen. 8, c. 38.

(f) 25 Hen. 8, c. 19, s. 2.

CH. VIII. s. 1. to appoint commissioners with very extensive powers, who, in conjunction with the royal theologian himself, were to revise and rectify the entire body of the canon law, in so far as operative within the realm. The same Act was apparently renewed about two years afterwards (*g*); and in 1543 a further statute (*h*) was passed for the purpose of giving the commissioners still larger powers of reform and amendment. Similar endeavours were likewise made in the following reign (*i*), Edward VI. being full of zeal and ardour in the cause, but his premature death occasioned its suspension; for although the consideration of the subject was resumed in 1 Eliz., when a bill was introduced to renew the appointment of commissioners, the measure was dropped on the second reading in the House of Commons, and, as we learn from Burnet, was not again revived (*k*). The commissioners, however, prepared an elaborate report, embodying therein a new code of ecclesiastical laws, and the work was subsequently published under the title of "*Reformatio Legum Ecclesiasticarum*," a document rendered venerable by the learning and piety of its framers, who drew it up not in the hasty spirit of experimental innovation, but after a calm and deliberate scrutiny of more than twenty years. An important chapter of the new work was devoted to the subject of divorce, as to which it contained a variety of minute regulations. Suffice it for the purposes of our present argument to say that the "*Reformatio Legum*" authorized divorce *à vinculo* in cases of adultery, malicious desertion, and mortal enmities; and it abrogated entirely the inferior remedy of divorce *à mensâ et thoro*. This code, it is true, had not the legislative sanction to make it the law of the land. But although not of actual binding obligation, it must have had great weight as expressing the opinion of the Reformed Church upon a question then regarded as purely ecclesiastical. Thus Sir John Stoddart, an eminent master of the canon law, informs us "that from about the year 1550 to the year 1602, marriage was not held by the church, and therefore was not held by the law, to be indissoluble" (*l*).

(*g*) 27 Hen. 8, c. 15.

(*h*) 35 Hen. 8, c. 16.

(*i*) 3 & 4 Edw. 6, c. 11.

(*k*) History of the Reformation, vol. ii. p. 731.

(*l*) See Minutes of Evidence taken

In proof of this position we have in the year 1548 the famous case of Parr, Marquis of Northampton (*m*), where it was held by a commission of delegates, that the mere act of adultery of itself dissolved the nuptial tie; and that a sentence of divorce by the Ecclesiastical Court following thereon (even although purporting to be only *à mensâ et thoro*) enabled the injured husband to marry again, living his guilty wife. It is unnecessary to state here the particulars of that celebrated and well-considered precedent. But the principle to be derived from it is this,—that where you have, by sentence of divorce issuing from a court of competent jurisdiction, a judicial ascertainment of adultery, not only is the nuptial tie rescinded, but the injured party is immediately at liberty to contract a second marriage. This may be taken to have been the opinion of the church at all events; and that opinion was probably acted upon by the laity. It does not, however, appear that the Ecclesiastical Courts gave sentences of express dissolution. They seem rather to have adhered to their ancient form of judgment; they only divorced *à mensâ et thoro*. But in whatever shape their decrees were pronounced, the community, in cases of adultery, relied upon them as justifying a second act of matrimony. This being the case, we find that towards the close of the reign of Elizabeth, certain important ordinances were enacted by the Chamber of Convocation. These, though now more or less forgotten or lost sight of, were passed with great solemnity and confirmed by the Queen. They were subsequently known as the Ecclesiastical Constitutions of 1597. One of these ordinances, the 105th canon, was in the following terms:—

Ch. VIII. s. 1.

Marquis of Northampton's case.

Forasmuch as matrimonial causes have been always reputed among the weightiest, and therefore require the greatest caution when they come to be handled and debated in judgment, especially in causes wherein matrimony is required to be dissolved or annulled; we strictly charge and enjoin that in all proceedings in divorce, and nullities of marriage, good circumspection and advice be used, and that the truth may, as far as possible, be sifted out by the depositions of witnesses and other lawful proofs; and that credit be not given to the sole confessions of the parties themselves, howsoever taken upon oath either within or without the Court.

Ordinances of Convocation in 1597.

before the Lords' Committee on the Privy Council Bill, Session 1844.

(*m*) Burnet's Reformation, vol. ii. p. 115.

CH. VIII. s. 1. Here, then, the process of *dissolving*, and the process of *annulling* matrimony, are plainly discriminated as separate remedies then existing in the Spiritual Courts. The words seem to admit of no other construction. They refer to the *dissolving* divorce, and to the *nullifying* divorce, as proceedings in themselves altogether distinct, substantive, and independent. Another canon, the 107th, passed on the same occasion, having nothing to do with dissolving or nullifying divorces, lays down the following regulation as to divorce *à mensâ et thoro* :—

In all sentences pronounced only for divorce and separation *à thoro et mensâ*, there shall be a caution and restraint inserted in the said sentence, that the parties so separated shall live chastely, and neither shall they, during each other's life, contract matrimony with other person. And for the better observance of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same shall have given good and sufficient caution and security unto the Court, that they will not any way break or transgress the said restraint or prohibition.

Prohibitory
bond.

In the year 1597, therefore, it still continued to be the opinion of the Church of England, that upon a divorce for adultery, even though only *à mensâ et thoro*, the parties might marry again. The very fact of enjoining a prohibitory bond, implies that the marriage, which the bond was intended to prevent, would have been valid. The learned and judicious Dr. Hammond lays it down with great clearness, that “requiring a bond does infer that this marriage, after a Christian divorce, is not looked on by the Church as an adulterous commission, but rather as a matter of dangerous consequence.” And this certainly was the prevailing sentiment of our ablest divines of the seventeenth century. Besides, the authors of the canon would not have designated such a connection by the name of matrimony, unless they had held it really entitled to that appellation.

The 107th canon, however, seems to have gone an unwarrantable length in prohibiting such engagements. Bishop Cozens contends that this part of the canon is illegal; and Dr. Hammond is of the same opinion, though he does not express himself so decidedly.

But while the Church of England, as a body, thus disclaimed the doctrine of indissolubility, it is probable that sundry in-

dividual ecclesiastics adhered to the old opinion. Thus Whitgift, who was Primate from 1583 to 1603, having called before him certain *sage divines and civilians*, put to them this question,—“Whether, after divorce, it were lawful for a man to marry again, his first wife being still alive?” To which they responded in the *negative*; whereupon, the archbishop being a member of the Court of Star Chamber, it was contrived soon afterwards, in 1602, to bring before that tribunal the case of *Rye v. Foljambe*. There it appears that Foljambe, having been divorced for adultery, married a second time, living his first wife; and it was held that the second marriage was void, “because,” according to the report of Moore (*n*), “the first divorce was but *à mensâ et thoro*, and not *à vinculo matrimonii*; and John Whitgift, then Archbishop of Canterbury, said that he had called to him at Lambeth the most wise divines and civilians, who all agreed in this.” Now of this determination some may think it enough to say that it was a “Star Chamber matter.” It was a direct contradiction of the “Reformatio Legum,” of the Marquis of Northampton’s case, and of the Ecclesiastical Constitutions of 1597. It was also opposed to the practice of the laity for at least half a century. Accordingly, Mr. Serjeant Salkeld, in his note upon the case (*o*), says that “in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery, the parties might marry again. But in *Foljambe’s case*, anno 44 Eliz., in the Star Chamber, *that opinion was changed*.” So that the decision appears to have had all the characteristics of an arbitrary exercise of power by a tribunal which, in fact, had no legal jurisdiction over the subject-matter; a tribunal, too, which, for its tyrannical excesses, was, in a few years afterwards, swept away by an indignant parliament (*p*).

CH. VIII. s. 1.

*Rye v.
Foljambe.*

The decision in *Foljambe’s case* was not assented to by the Church of England; for the Chamber of Convocation, its Ordinances of Convocation in 1603.

(*n*) P. 683.(*o*) 3 Salk. 138.(*p*) “A court, the very name whereof is sufficient to blast allprecedents brought from it.” Per Yates, J., in the case of *Millar v. Taylor*, 4 Burr. 2303.

Ch. VIII. s. 1. popular parliament, in the succeeding year, re-enacted, word for word, the Ecclesiastical Constitutions of 1597; and these, as subsequently confirmed by James I., became the well-known canons of 1603. In the following year, 1604, the Statute of Bigamy (1 Jac. 1, c. 11) was passed by the legislature, making the offence felony; but containing an express proviso that the act should "not extend to any person divorced by sentence of the Ecclesiastical Court." For the legislature, we may well believe, did not intend to make that a felony which had so often received the sanction of competent authorities, which had been approved as legal by the delegates in 1548, and which had been twice confirmed as valid by the Chamber of Convocation; once in 1597, and again in 1603.

Whether divorces were ever decreed in Chancery.

How far the conduct of the laity may have been affected by these proceedings it is difficult now to conjecture. What particular rule respecting second marriages was followed in the reign of James I., or in that of his son, or during the time of the Commonwealth, we know not. Mr. Spence, indeed, in his work on Equitable Jurisdiction (*q*), suggests it as "not unlikely" that the Court of Chancery decreed divorces *à vinculo matrimonii*; and upon that surmise builds another, namely, that the American courts of equity carried over with them from England their now existing practice of dissolving marriage contracts. With great respect for Mr. Spence, it must be observed, that both these speculations seem groundless. As to what was anciently done by the clerical chancellors, there is no evidence that any of them, as chancellors, ever meddled with the marriage contract. If the proposition had been advanced respecting the Privy Council, or Court of Star Chamber, there would have been more colour for it. But as to the Court of Chancery, there is nothing to support the fabric of Mr. Spence, except two obscure entries in Tothill's Reports (*r*), referable to the time of Lord Ellesmere, and occurring near the close of Queen Elizabeth's reign. The cases there mentioned, however, are cases of divorce *à mensâ et thoro*, and not *à vinculo matri-*

(*q*) Vol. i. p. 702.

(*r*) Ed. 1649, p. 61; ed. 1671, p. 124.

monii. This has been ascertained on an examination of the proceedings which are still extant in the Rolls Office (*s*). In the Life of Sir Leoline Jenkins (*t*), notice is taken of "Pierrepont's petition to the Lord Keeper for a commission to dissolve a marriage." But this seems to have been a mere experiment made shortly after the Restoration, and before the government was settled. It came to no result further than that the Lord Keeper ordered a reference (probably to Sir Leoline Jenkins himself), and, upon a report, the matter dropped.

As we are on this subject it may be as well to observe in passing, that sentences of divorce could in no case be had after the death of the parties; neither after the death of the husband, though the wife should be alive, nor after the death of the wife, though the husband should be alive (*u*).

Divorce could not be had after death of parties.

But to resume our recital: we are, in the reign of Charles II., enabled to lay our finger upon a case which shows that so far down as the year 1669, the only obstacle which was considered an insuperable impediment to a second marriage after sentence of divorce *à mensâ et thoro* for adultery, was the bond in the Ecclesiastical Court; which, however, could have been binding upon *one* only of the parties. The case to which reference is made is that of Lord Roos, which has been usually considered as furnishing the first example of a parliamentary divorce; whereas it was a bill brought in merely to be relieved from the restraint and prohibition of the Ecclesiastical Court. The facts were shortly these: In the year 1666, an Act was passed bastardizing the children of Lady Anne Roos, by reason of her adultery; whereupon her husband, Lord Roos, followed up this proceeding by obtaining from the Spiritual Court a sentence of divorce *à mensâ et thoro*, upon the usual condition of not marrying again in his wife's lifetime, for which he gave security as required by the canon. In this situation, being the next heir to the Rutland peerage, he was advised, that, although his marriage was rescinded, he had still to get rid of his bond or recog-

(*s*) This information is due to inquiry.

the kindness of Mr. Busk, of the (t) Vol. ii. p. 723.

Chancery bar, whose professional (u) Com. Dig., tit. "Bar. & Fem." avocations led to his making the (c. 6).

Ch. VIII. s. 1. nizance. No other way seemed so proper or sufficient for this purpose as an Act of Parliament. Accordingly a bill was brought in, entitled "An Act for Lord Roos to marry again." This, therefore, was not a divorce bill. It did no more than simply enable Lord Roos to contract a second marriage, the canon and the bond notwithstanding (x).

The case is principally interesting and important as constituting a distinct legislative negation of the doctrine of indissolubility. The difference between it and the case of the Marquis of Northampton was this: The Marquis was barred by no restraint from marrying another wife immediately after the sentence; whereas Lord Roos was prevented from doing so by the canon and the bond, from the binding cogency of which it was the sole object of the bill to relieve him.

First case of
parliamentary
divorce.

The first genuine example of a dissolution of the nuptial tie by parliament was in the case of the notorious mother of Savage—the Countess of Macclesfield. There the aid of the legislature was sought, because, in consequence of the skilful opposition set up by the Countess in the Spiritual Courts, and the narrow antiquated maxims which there prevailed, she contrived to baffle all her husband's efforts to obtain a sentence of divorce *à mensâ et thoro*. The circumstances of the case, however, were so scandalous and flagrant, that it would have been an outrage upon every principle of justice to withhold relief. Accordingly, the bill of Lord Macclesfield made its way through parliament in 1697, unembarrassed by any other opposition than some feeble expressions of dissent on the part of the Roman Catholic members.

Second case.

The next instance of a legislative dissolution of marriage was in the Duke of Norfolk's case. There also a sentence of divorce was refused by the Ecclesiastical Court, although the Duke tried the experiment more than once. He, however, recovered damages at law from the adulterer, Sir John Jermaine. And after this bill had been repeatedly rejected by the Lords, it became at last successful in 1700. And this brings us to the

(x) A copy of the bill in Lord Roos's case, procured from the Parliament Office, is given at length in an article of Mr. Macqueen's on "Divorce" in the Law Review of February, 1845.

case of Box, in 1701, which may be pronounced the earliest specimen of a dissolving statute passed by the legislature, after sentence of divorce in the Ecclesiastical Court. To this era, therefore, is to be referred the commencement of the system of parliamentary divorce; which, though not so old as generally fancied, has still a respectable antiquity. Ch. VIII. s. 1.
Case of Box.

The petition of Mr. Box, as entered in the Lords' Journal of Feb. 19, 1700, prays that he may have "leave to bring in a bill to dissolve his marriage with Elizabeth Eyre, she having lived in adultery, as he hath fully proved in the Court of King's Bench, and obtained a definitive sentence in the Arches Court of Canterbury." The bill was intituled, "An Act to dissolve the marriage of Ralph Box with Elizabeth Eyre, and to enable him to marry again;" a title followed from that time until 1857. The bill passed in 1701.

SECTION II.

DISSOLUTION OF MARRIAGE BY DIVORCE.

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The subject of divorce cannot be discussed in detail in this Treatise; but the law on this matter is, it is hoped, summarized here in such a way as to show the effect which decrees of divorce and judicial separation, and protection orders have upon the relation of husband and wife.

In 1857, all jurisdiction in matrimonial matters was transferred from the Ecclesiastical Courts to the Court for Divorce and Matrimonial Causes, now the Probate and Divorce Division Institution of
the Divorce
Court.

Ch. VIII. s. 2. of the High Court of Justice. This Court was established by 20 & 21 Vict. c. 85 (a), and under that and subsequent amending statutes (b) it acquired not only all the powers of the Ecclesiastical Courts, but also power to pronounce decrees for dissolution of marriage, which down to that date could only have been obtained by Acts of Parliament.

Suits which it can entertain.

The Court has power, therefore, to deal with suits for dissolution of marriage (c), for judicial separations, which are thus substituted for divorces *a mensâ et thoro* (d), for nullity of marriage, for restitution of conjugal rights, and for jactitation of marriage; it can give an injured husband damages (e), can deal with the custody of children (f), can make provision for the wife (g), can order a settlement to be made of property to which the wife is entitled, and can deal with settlements whether ante-nuptial, or post-nuptial, and whether there are children of the marriage or not (h). A husband can present a petition for the dissolution of his marriage on the ground that his wife has been guilty of adultery; and a wife may seek the same relief on the ground that her husband has been guilty of incestuous adultery, of bigamy with adultery, of rape, of sodomy, of bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her in the Ecclesiastical Courts to a divorce *a mensâ et thoro*, or of adultery coupled with desertion without reasonable excuse for two years or upwards (i).

Grounds for petition.

A husband may claim damages from a person who has committed adultery with his wife, and the Court can direct in what manner such damages shall be applied (k).

Parties can give evidence.

Parties to any proceeding instituted in consequence of adultery,

(a) See Macqueen on the Law of Divorce (2nd ed.), 1860.

(b) See 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 29 & 30 Vict. c. 32; 31 & 32 Vict. c. 77; 36 Vict. c. 71; 41 Vict. c. 19.

(c) 20 & 21 Vict. c. 85, ss. 27, 31; 23 & 24 Vict. c. 144, s. 7.

(d) 20 & 21 Vict. c. 85, ss. 6, 7, 16.

(e) 20 & 21 Vict. c. 85, s. 33.

(f) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4.

(g) 20 & 21 Vict. c. 85, s. 32; 29 & 30 Vict. c. 32, ss. 1, 2.

(h) 20 & 21 Vict. c. 85, s. 45; 22 & 23 Vict. c. 61, s. 5; 23 & 24 Vict. c. 144, s. 6; 41 Vict. c. 19, s. 3.

(i) 20 & 21 Vict. c. 85, s. 27.

(k) Sect. 33.

and the husbands and wives of such parties, are competent to give evidence in such proceeding; but no witness shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (*l*). The protection of this proviso must be claimed by the witness, as otherwise the evidence is admissible (*m*). This provision does not enable a husband, against whom proceedings are taken to compel him to maintain a child born in wedlock, to give evidence of non-access so as to bastardize his child (*n*).

Ch. VIII. s. 2.

The Divorce Court is a Court for England, which word includes Wales; but for the purposes of the jurisdiction of the Court, Ireland, Scotland, the Isle of Man, the Channel Islands, and the British Colonies are considered foreign countries (*o*).

Jurisdiction.

As a rule the question of divorce is an incident of status to be disposed of by the law of the husband's domicile, and a wife's remedy for matrimonial wrongs must generally be sought in the place of her husband's domicile (*p*), for the domicile of the husband is that of the wife, and she cannot acquire a separate domicile unless she has at least obtained a decree of judicial separation (*q*).

Domicile.

A Scotch Court has no jurisdiction to decree the dissolution of a marriage between persons possessing an English domicile and married in England, if the parties have recourse to Scotland for the purpose of constituting a merely forensic domicile and are not *bonâ fide* domiciled there, even though the suit is instituted by the wife, who is by agreement living apart from

(*l*) 32 & 33 Vict. c. 68, s. 3; 1 P. D. 139; *Firebrace v. Firebrace*, *Brown v. Brown*, L. R., 3 P. & M. 4 P. D. 63.

(*m*) *Hebblethwaite v. Hebblethwaite*, L. R., 2 P. & M. 29. (*p*) *Firebrace v. Firebrace*, 4 P. D. 63; *Harvey v. Farnie*, 8 App. Cas. 43; 6 P. D. 35.

(*n*) *The Guardians of Nottingham v. Tomkinson*, 4 C. P. D. 343. (*q*) *Dalhousie v. McDouall*, 7 Cl. & Fin. 817; *Yelverton v. Yelverton*, 29 L. J., P., M. & A. 34; *Lolley's case*, 1 Russ. & Ry. 237.

(*o*) *Yelverton v. Yelverton*, 1 S. & T. 586; *Bond v. Bond*, 29 L. J., P., M. & A. 143; *Le Sueur v. Le Sueur*,

Ch. VIII. s. 2. her husband (*r*). So, also, a decree for a divorce granted by a foreign Court does not invalidate a marriage solemnized in England between English subjects domiciled in England (*s*). And no foreign Court can dissolve such a marriage between such persons on grounds for which it could not be dissolved in England (*t*); but an English Court will recognize as valid the decree of a foreign Court dissolving a marriage between a domiciled inhabitant of that country whose domicile has never been changed and an Englishwoman, where the marriage was solemnized in England, though the marriage is dissolved for a cause which would not be a ground for a divorce in England (*u*). But where there is residence in England, it would seem that it does not follow that there must also be domicile to give the Court jurisdiction, for where an Englishwoman married a Frenchman at Gibraltar and afterwards resided in England, the husband preserving his foreign domicile, where the offences were committed in England, and the parties were resident here at the time of the petition by the wife for a divorce, the majority of the Court of Appeal held that the statute empowered the Divorce Court to entertain the suit, as the matrimonial home of the parties was within the jurisdiction (*x*). Brett, L. J., however, who dissented, held that the domicile of the husband was the test of the jurisdiction. A decree was granted against a foreigner, where the marriage was celebrated in England, although the offences were committed abroad (*y*). Where, however, the husband's domicile was in Jersey, and the marriage, the cohabitation, and the offences all took place there, it was held that the English Court had no jurisdiction to entertain a suit for divorce (*z*).

Validity of
ceremony.

Where the question is one of the validity of the ceremony, then the law of the country where the marriage is solemnized

(*r*) *Dolphin v. Robins*, 7 H. L. C. 43; 6 P. D. 35.
390.

(*s*) *Shaw v. Att.-Gen.*, L. R., 2 See the remarks on this case in
P. & M. 156. *Harvey v. Farnie*, *supra*.

(*t*) *Lolley's case*, 1 Russ. & Ry. (*y*) *Santo Teodoro v. Santo Teodoro*,
237; 2 Cl. & F. 567; *Briggs v.* 5 P. D. 79.

Briggs, 5 P. D. 163. (*z*) *Le Sueur v. Le Sueur*, 1 P. D.

(*u*) *Harvey v. Farnie*, 8 App. Cas. 139.

must be considered, but questions of personal capacity to contract a marriage are decided by the domicile of the parties (*a*); and the Court of Appeal, in so holding, distinguished the case of *Simonin v. Mallac* (*b*), in which the full Court of Divorce refused to pronounce a decree of nullity in a case in which French subjects had come to England to be married, in order to avoid certain requirements of the French law, on the ground that the consent of the parents, which had not been obtained as required by the law of France, must be taken to be a part of the ceremony of marriage, and not a matter affecting the capacity of the parties to contract marriage (*c*).

Proceedings for dissolution of marriage can be instituted on behalf of or against a lunatic husband or wife; such proceedings may be instituted by the committee of the lunatic, and a guardian *ad litem* will be appointed if necessary (*d*).

Where party to suit is a lunatic.

Passing now to the grounds for which a divorce may be granted, it may be observed that incestuous adultery is defined by the statute to be adultery "committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity" (*e*).

Incestuous adultery defined.

The prohibited degrees are specified in the table drawn up by Archbishop Parker, published by the authority of Queen Elizabeth, and often found prefixed to Bibles and the Book of Common Prayer. They are, in fact, the degrees specified in Leviticus, and are also found in Coke's 2 Inst. 683. The Statutes 32 Hen. 8, c. 38, revived by 1 Eliz. cc. 1 and 5, and 5 & 6 Will. 4, c. 54, are those now in force relating to this question (*f*). The laws of consanguinity or affinity apply in England to bastards, so that illegitimate children are for this purpose in the same position as legitimate children (*g*).

Prohibited degrees.

Bastards.

(*a*) *Sottomayer v. De Barros*, 3 2 H. L., Sc. & Div. 374; *Baker v. Baker*, 5 P. D. 142; 6 P. D. 12; P. D. 1.

(*b*) 1 S. & T. 67; 29 L. J., P., M. & A. 97. Rules of Div. Ct. 196.

(*c*) 20 & 21 Vict. c. 85, s. 27.

(*d*) See, however, the remarks of Sir J. Hannen in *Sottomayer v. De Barros*, 5 P. D. 94. 1 Moo. P. C. C. 353; *Brook v. Brook*, 9 H. L. Cas. 193.

(*f*) See notes to *Sherwood v. Ray*,

(*g*) *R. v. St. Giles*, 11 Q. B. 173.

Ch. VIII. s. 2.Bigamy.

Bigamy is for the purposes of the Divorce Court, the "marriage of any person, being married, to any other person during the life of the former husband or wife; whether the second marriage shall have taken place within the dominions of her Majesty or elsewhere" (*h*).

Rape, sodomy and bestiality are, for purposes of the Divorce Court, the same as the crimes known under those names, and dealt with by 24 & 25 Vict. c. 100, ss. 48 and 61.

What constitutes legal cruelty.

To establish a charge of legal cruelty, there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it (*i*). Neglect, coldness, indifference, isolation, abusive language, drunken habits, want of consideration or courtesy, petty annoyances, do not any of them by themselves constitute legal cruelty. Wilful communication of venereal disease is cruelty (*k*), and force, whether physical or moral, systematically exerted to compel submission of a wife in such a manner, to such a degree, and during such length of time as to break down her health and render a serious malady imminent, is legal cruelty (*l*). In a wife's suit for dissolution, the adultery of the husband being proved, the Court dismissed the petition where the wife had been guilty of cruelty, of wilful separation, and of misconduct conducing to the adultery (*m*). In a husband's suit for a judicial separation, on the ground of cruelty, the Court held that he was entitled to a decree, for although the physical effects of a wife's violence are less than those of a man's violence, yet the moral effects are in such a case greater (*n*).

Desertion.

Desertion without reasonable excuse when coupled with adultery, is a cause for which a wife may obtain a decree of divorce; desertion without cause for two years is a ground for a judicial separation, and desertion or wilful separation is

(*h*) 20 & 21 Vict. c. 85, s. 27.

L. R., 1 P. & M. 46.

(*i*) *Evans v. Evans*, 1 Hag. O. C. 39; *Westmeath v. Westmeath*, 2 Hag. Ecc. 55; *Milford v. Milford*, L. R., 1 P. & M. 295.

(*l*) *Kelly v. Kelly*, L. R., 2 P. & M. 59.

(*k*) *Boardman v. Boardman*, L. R., 1 P. & M. 233; *Brown v. Brown*,

(*m*) *Boreham v. Boreham*, L. R., 1 P. & M. 77.

(*n*) *Prichard v. Prichard*, 3 S. & T. 523.

a discretionary defence to a petition for a divorce. The word Ch. VIII. s. 2. desertion always means the same, whether it is used alone or coupled with the words "without cause" or "without reasonable excuse," but it need not have lasted for two years, to enable a respondent to set it up in answer to a petition for a divorce (o).

No one can be said to desert, who does not absent himself or herself from the society of the other without the consent of that other, and who does not actually and wilfully bring to an end an existing state of cohabitation (p); an involuntary separation caused by imprisonment does not therefore constitute desertion (q); and a husband may still be guilty of desertion even though he supports his wife while absent from her (r). A separation by mutual agreement under a deed is not desertion (s); although, where the husband obtained an agreement from his wife that they should live separate, and, this being carried out, the wife committed adultery, the Court held that there being no reasonable ground for the agreement the husband had deserted his wife, and refused to grant him a divorce (t); but where there has been no bargain or consent, absence may constitute desertion, even though an allowance has been made (u); and separation, which is not at first desertion, may become so by acts which show an intention on the part of the absentee to abandon his or her partner (x). A *bonâ fide* belief on the part of a husband that his wife had wronged him has been held to justify a separation (y); but the conviction of a wife for a crime will not justify her husband in refusing to cohabit with her; and if by declining to do so he conduces to her adultery, he will be unable to obtain relief (z).

(o) *Yeatman v. Yeatman*, L. R., 1 P. & M. 489.

(p) *Fitzgerald v. Fitzgerald*, L. R., 1 P. & M. 694; *Thompson v. Thompson*, 27 L. J., P. & M. 65.

(q) *Townsend v. Townsend*, L. R., 3 P. & M. 129.

(r) *Yeatman v. Yeatman*, *supra*.

(s) *Crabbe v. Crabbe*, L. R., 1 P. & M. 601; *Parkinson v. Parkinson*,

L. R., 2 P. & M. 25; *Buckmaster v. Buckmaster*, L. R., 1 P. & M. 713.

(t) *Dagg v. Dagg*, 7 P. D. 17.

(u) *Nott v. Nott*, L. R., 1 P. & M. 251.

(x) *Yeatman v. Yeatman*, *supra*.

(y) *Ousey v. Ousey*, L. R., 3 P. & M. 223.

(z) *Williamson v. Williamson*, 51 L. J., P. D. & A. 54.

Ch. VIII. s. 2.

Damages for wife's adultery.

Petition dismissed if connivance, condonation, or collusion established.

A husband who petitions for a divorce or a judicial separation may claim damages on the ground of the adultery of the co-respondent with his wife, and the Court may direct how such damages are to be applied, and can settle them for the benefit of the children, or as a provision for the maintenance of the wife (z).

The statute directs that the Court shall dismiss a petition, if it is not satisfied that the alleged adultery has been committed, or if the petitioner has been accessory to or connived at or condoned the adultery, or that the petition is presented in collusion with either of the respondents (a). To establish connivance, there must be more than negligence or indifference, there must be acquiescence, active or passive (b). The intention of the husband is a material element, and his conduct must, in order to bar his right to relief, have conduced to the adultery, but he will be held to have connived if, when there are reasonable grounds for suspecting adulterous intercourse, he yet does not interfere (c). If a wife, in order to obtain an allowance, consents that her husband shall live in adultery, her conduct amounts to connivance; but the mere acceptance of an allowance, under a separation deed, does not without other evidence establish connivance (d). If a husband employs a man to get evidence of adultery upon which to obtain a divorce, and the wife is purposely induced by the intervention of that man to commit adultery, then it would seem that the husband cannot obtain a divorce (e).

Condonation.

Condonation also bars the right to relief, and applies both to adultery and to cruelty. It is conditional forgiveness with full knowledge of all the circumstances, and with a due regard to the future, and is a question of fact (f); it may be expressed or implied (g); it must be followed by cohabitation (h); it is conditional, and the condition is, that the husband shall not for the

(z) 20 & 21 Vict. c. 85, s. 33.

(a) 20 & 21 Vict. c. 85, s. 31.

(b) *Phillips v. Phillips*, 1 Robert. 145; *Allen v. Allen*, 30 L. J., P. & M. 2.

(c) *Gipps v. Gipps*, 33 L. J., P. & M. 161.

(d) *Ross v. Ross*, L. R., 1 P. & M. 734.

(e) *Picken v. Picken*, 34 L. J., P. & M. 22; *Gower v. Gower*, L. R., 2 P. & M. 428.

(f) *Dempster v. Dempster*, 31 L. J., P. & M. 20.

(g) *Beeby v. Beeby*, 1 Hag. Ecc. R. 793.

(h) *Keats v. Keats*, 28 L. J., P. & M. 57.

future be guilty of any marital offence; so that it is wiped out by repeated misconduct (i). Ch. VIII. s. 2.

A marital offence, which has been condoned, may be revived by a subsequent offence. The subsequent offence need not be of the same character as that which it revives; adultery condoned may, therefore, be revived by subsequent incestuous adultery; by subsequent adultery, which is not incestuous, as well as by cruelty; cruelty may be revived by subsequent cruelty or by adultery; and desertion, which has been condoned, may be revived by subsequent adultery (j); and it would seem that less cruelty will be required to revive a condoned marital offence than would be required to establish an original charge (k).

Collusion is established where it is proved that the parties have agreed to act so as to obtain a divorce (l); or where, by agreement, they procure the withdrawal from the notice of the Court of facts which are relevant to the suit before the Court (m). The fact that a husband makes his wife an allowance in lieu of alimony, while a divorce suit is pending, is not by itself evidence of collusion (n); but where the husband gave the wife money, and urged her not to oppose the petition, and where the matrimonial offence was committed in pursuance of a promise made to the other party to give an opportunity of getting a divorce, the petition was rejected on the ground of collusion (o). Collusion

The Court has, in the cases above specified, no option but to dismiss the petition; but in certain other cases the Court has a discretion, for the statute enacts that the Court shall not be bound to pronounce a decree if the petitioner has, during the marriage, committed adultery, if there has been unreasonable delay in presenting or prosecuting the petition, if the petitioner Grounds on which Court may dismiss petition.

(i) *Peacock v. Peacock*, 27 L. J., P. & M. 71; 1 S. & T. 84; *Dent v. Dent*, 34 L. J., P. & M. 48; 4 S. & T. 105; *Newsome v. Newsome*, L. R., 2 P. & M. 306; *Blandford v. Blandford*, 8 P. D. 19; *Collins v. Collins*, 9 App. Cas. 205.

(j) *Palmer v. Palmer*, 29 L. J., Mat. 124; *Newsome v. Newsome*, *supra*; *Dent v. Dent*, *supra*; *Bramwell v. Bramwell*, 3 Hag. Ecc. Rep. 761; *Blandford v. Blandford*, 8 P.

D. 19.

(k) *D'Aguilar v. D'Aguilar*, 1 Hag. Ecc. 773, at p. 781; *Durant v. Durant*, 1 Hag. Ecc. 733, at p. 765.

(l) *Lloyd v. Lloyd*, 1 S. & T. 567.

(m) *Hunt v. Hunt*, 47 L. J., P. D. & A. 22.

(n) *Barnes v. Barnes*, L. R., 1 P. & M. 505.

(o) *Todd v. Todd*, L. R., 1 P. & M. 121.

Ch. VIII. s. 2. has been guilty of cruelty towards the other party, has deserted or wilfully separated without excuse from the respondent before the adultery complained of, or has been guilty of such wilful neglect or misconduct as has conduced to the adultery (*p*).

When relief granted notwithstanding adultery of petitioner.

In three classes of cases the Court has been wont to grant a divorce notwithstanding the adultery of the petitioner; first, where the petitioner believed that the other party was dead; secondly, where the petitioner was compelled by her husband to lead a life of prostitution; and thirdly, where the adultery had been condoned, and had no connection with the offence charged in the suit (*q*); it has also done so in cases where the petitioner acted in ignorance, and was innocent of any intention to commit adultery; but the exercise of the discretion given by the statute cannot depend upon the more or less pardonable circumstances which attend the commission of the offence (*r*).

Delay.

A delay of two years after knowledge of all the facts requires explanation (*s*); but want of means or, in the case of a wife, forbearance at her mother's request to take proceedings in a case of incestuous adultery, misconduct of the petitioner's agent and misapprehension by the petitioner of the law, have been held to afford sufficient explanation of what would otherwise be unreasonable delay (*t*).

Neglect.

Cruelty, desertion, and wilful separation have already been treated of, so that it only remains to consider what is wilful neglect or misconduct conducing to the adultery, which will justify the Court in refusing to grant the petition. The neglect or misconduct must be after the marriage, and must conduce to the first act of adultery; mere carelessness, mere omission to do something will not constitute misconduct; there must be knowledge of danger, and a purposed or reckless disregard of it (*u*);

(*p*) 20 & 21 Vict. c. 85, s. 31.

(*q*) *Morgan v. Morgan*, L. R., 1 P. & M. 644; *Coleman v. Coleman*, L. R., 1 P. & M. 81.

(*r*) *Noble v. Noble*, L. R., 1 P. & M. 691; *Barnes v. Barnes*, L. R., 1 P. & M. 572.

(*s*) *Nicholson v. Nicholson*, L. R., 3 P. & M. 53.

(*t*) *Short v. Short*, L. R., 3 P. & M. 193; *Wilson v. Wilson*, L. R., 2 P. & M. 435; *Pellew v. Pellew*, 29 L. J., P. & M. 44; *Tollemache v. Tollemache*, 1 S. & T. 557; *Newman v. Newman*, L. R., 2 P. & M. 57; *Mason v. Mason*, 31 W. R. 361.

(*u*) *St. Paul v. St. Paul*, L. R., 1 P. & M. 739; *Dering v. Dering*, L. R., 1 P. & M. 531.

mere suspicion of misconduct is not enough to bar the right of the petitioner (*x*); but neglect, such as sending a wife to live in a place of temptation (*y*); coercion used to compel her to lead a life of prostitution (*z*); or adultery brought about by an agent of the husband (*a*); are instances of misconduct which will entitle the Court to dismiss a petition. Ch. VIII. s. 2.

In any suit for dissolution of marriage, if the respondent being a husband opposes the relief sought on the ground of the adultery or cruelty of the petitioner; or being a wife, on the ground of the adultery, cruelty or desertion of the petitioner, the Court may give the respondent the relief to which he or she would be entitled if he or she had filed a petition seeking such relief (*b*). Decree of judicial separation may be granted when divorce refused.

SECTION III.

THE DECREE AND ITS EFFECTS.

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A decree of dissolution of marriage is only a decree nisi in the first instance, not to be made absolute for six months (*c*). Decree is nisi in the first instance.
The decree when made absolute is for all purposes a complete

(*x*) *Davies v. Davies*, 32 L. J., P. & M. 111.

(*y*) *Coleman v. Coleman*, L. R., 1 P. & M. 81.

(*z*) *Gower v. Gower*, L. R., 2 P. & M. 428.

(*a*) *Baylis v. Baylis*, L. R., 1 P. & M. 395.

(*b*) 29 Vict. c. 32, s. 2.

(*c*) 23 & 24 Vict. c. 144, s. 7; 29 Vict. c. 32, s. 3. The Court has power in special circumstances to fix a shorter time than six months, but not less than three months. *Watton v. Watton*, L. R., 1 P. & M. 227; *Fitzgerald v. Fitzgerald*, L. R., 3 P. & M. 136.

Ch. VIII. s. 3. severance of the matrimonial tie, and enables either party to marry again, so that the rights of a divorced husband which depend on the contract of marriage cease at the date of the decree becoming absolute (*d*); and a husband who has been divorced from his wife is no longer responsible for any debts which she may contract even for necessities, or for any torts which she may commit, or even which she has committed during coverture (*e*); for the woman becomes by the decree in all respects a *feme sole*, she can sue and be sued, and is alone responsible on her contracts, and for her torts. The decree bars the right of the wife to dower (*f*). A decree nisi does not put an end to the coverture, and the legal status of the parties is not altered until the decree has been made absolute (*g*); but, in the case of marriages contracted before January 1st, 1883, a husband will not be allowed, after a decree nisi has been pronounced, to reduce into possession choses in action of the wife, the title to which has accrued before that date (*h*).

When absolute dissolves the marriage and makes the woman a *feme sole*.

Decree of divorce makes wife a *feme sole*.

Where a woman obtained a decree for a divorce she became thereby a *feme sole*, so that the marital right of her husband in respect of future property belonging to her ceased from the date of the decree. Where, at the date of a decree of dissolution of marriage, made at the suit of the wife, she was entitled to a reversionary interest which fell into possession after the date of the divorce, she, and her executors on her death, were held to be entitled to the fund (*i*). The dissolution of the marriage does not of itself forfeit the rights of the guilty party in property included in a marriage settlement (*k*), although the Court has power, after a final decree, to deal with settlements (*l*);

(*d*) *Wilkinson v. Gibson*, L. R., 4 Eq. 162. A divorced husband was held to take a life interest given on the death of the daughter of the testator to any husband who should survive her; *Re Bullmore*, 52 L. J., Ch. 456.

(*e*) *Capel v. Powell*, 34 L. J., C. P. 168; 17 C. B., N. S. 743.

(*f*) *Frampton v. Stephens*, 21 Ch. D. 164.

(*g*) *Norman v. Villars*, 2 Ex. D. 359; *Hulse v. Hulse*, L. R., 2 P. & M. 259.

(*h*) *Prole v. Soady*, L. R., 3 Ch. 220.

(*i*) *Wilkinson v. Gibson*, L. R., 4 Eq. 162.

(*k*) *Fitzgerald v. Chapman*, 1 Ch. D. 563; *Burton v. Sturgeon*, 2 Ch. D. 318.

(*l*) 22 & 23 Vict. c. 61, s. 5; 41 Vict. c. 19, s. 3.

The Act of 1857 provided, by section 45, that in any case in which a sentence of divorce or judicial separation should be pronounced for the adultery of the wife, it should appear that she was entitled to any property either in possession or reversion, the Court might order a settlement of such property, or any part thereof, for the benefit of the innocent party and the children of the marriage (*m*). It was held that this section did not give the Court power to deal with a settlement made on the marriage of the parties of the suit (*n*), or to deal with property, the payment of which to the wife was dependent on the discretion of trustees, such a possibility not being a reversion within the statute (*o*). Much larger powers were given to the Court by 22 & 23 Vict. c. 61, s. 5 (*p*), which provides that the Court may, after a final decree of nullity of marriage or dissolution of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage, or of their respective parents as to the Court shall seem fit.

Ch. VIII. s. 3.
Court has power to deal with settlements.

Under this section the Court can deal with all deeds whereby property is settled on a woman in her character of a wife, and by which money is to be paid to her while she continues a wife (*q*), as well as with a power of appointment given to a wife by settlement (*r*), but until recently there was no power to make an order under this section, unless there was issue of the marriage living at the time when the order was applied for (*s*). The Court can now, however, exercise the power given by the above section, notwithstanding that there are no children of the

Whether there is issue or not.

(*m*) *Sykes v. Sykes*, L. R., 2 P. & M. 163.

(*n*) *Norris v. Norris*, 27 L. J., P. & M. 72.

(*o*) *Milne v. Milne*, L. R., 2 P. & M. 295.

(*p*) See also Rules of the Divorce Court, 95 *et seq.*, 204.

(*q*) *Jump v. Jump*, 8 P. D. 159; *Worsley v. Worsley*, L. R., 1 P. & M. 648.

(*r*) *Evered v. Evered*, 43 L. J., P. & M. 86; 31 L. T., N. S. 101.

(*s*) *Thomas v. Thomas*, 2 Sw. & T. 89; *Bird v. Bird*, L. R., 1 P. & M. 231; *Corrance v. Corrance*, L. R., 1 P. & M. 495.

Ch. VIII. s. 3. marriage (*t*); this last provision is not retrospective (*u*); where however, the decree nisi was pronounced before, but was not made absolute until after, the amending Act came into force, the Court varied a settlement, even though there was no issue of the marriage (*v*). The respondent to a petition for a divorce will be restrained from disposing of property included in a post-nuptial settlement, before the petitioner who has obtained a decree nisi can obtain an order varying the settlement (*x*). A settlement cannot be varied by depriving an infant child of an interest secured to it by the settlement (*y*), or by altering the destination of dividends due before the date of the order (*z*), but it seems that provisions as to the appointment of trustees will be altered (*a*).

Object regarded in dealing with settlement.

The object of the Court in varying the provisions of a settlement is to prevent the innocent party from being damaged in a pecuniary sense by the dissolution of the marriage (*b*). An innocent party, therefore, may be relieved from a covenant to appoint in favour of the guilty party (*c*), and the conduct of the parties as well as their pecuniary position will be taken into consideration (*d*). Where a marriage is dissolved on the wife's petition, and the husband's interest in property brought into settlement by the wife is extinguished, the Court will not impose the condition that she shall only enjoy the property *dum sola et casta vixerit* (*e*), although such a condition may be imposed when the husband is ordered to make her an allowance out of his private means (*f*), and the discretion given to the Court is wide enough to enable the Court to exclude a guilty

(*t*) 41 Vict. c. 19, s. 3.

(*u*) *Yglesias v. Yglesias*, 4 P. D. 71.

(*v*) *Ansdell v. Ansdell*, 5 P. D. 139.

(*x*) *Noakes v. Noakes*, 4 P. D. 60; *Watts v. Watts*, 24 W. R. 623.

(*y*) *Crisp v. Crisp*, L. R., 2 P. & M. 426.

(*z*) *Paul v. Paul*, L. R., 2 P. & M. 93,

(*a*) *Maudslay v. Maudslay*, 2 P. D. 256; *Oppenheim v. Oppenheim*, 53 L. J., P. D. & A. 48; but see *Hope v.*

Hope, L. R., 3 P. & M. 226; and *Davies v. Davies*, 37 L. J., P. & M. 17.

(*b*) *Maudslay v. Maudslay*, 2 P. D. 256; *March v. March*, L. R., 1 P. & M. 440.

(*c*) *Benyon v. Benyon*, 1 P. D. 447.

(*d*) *Chetwynd v. Chetwynd*, L. R., 1 P. & M. 39.

(*e*) *Gladstone v. Gladstone*, 1 P. D. 442.

(*f*) *Fisher v. Fisher*, 2 S. & T. 410; *Chetwynd v. Chetwynd*, L. R., 1 P. & M. 39.

party from the benefit of property brought into settlement on Ch. VIII. s. 3. the marriage (g).

The trustee of a marriage settlement cannot apply to alter the settlement; but he may oppose an application (h). If a petitioner dies pending proceedings the guardian of the children should make the application (i); if the petitioner dies before the decree nisi has been made absolute, the Court will not make the decree absolute so as to enable the settlements to be varied (k).

Trustee cannot apply to vary settlement.

SECTION IV.

DECREE OF JUDICIAL SEPARATION AND ITS EFFECTS.

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In all cases in which a decree for a divorce *a mensâ et thoro* could formerly have been pronounced the Court can now pronounce a decree for a judicial separation, which has the same consequences as the divorce *a mensâ et thoro* had (l); a judicial separation may also be obtained on the ground of adultery, cruelty or desertion, without cause for two years or upwards (m).

When a decree of judicial separation may be granted.

If a husband is convicted of an aggravated assault upon his wife within the meaning of 24 & 25 Vict. c. 100, s. 43, the Court or magistrate before whom he is convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall no longer be bound to cohabit with her husband.

Cases of aggravated assault.

(g) *Wigney v. Wigney*, 7 P. D. 177 (C. A.); *Clifford v. Clifford*, 9 P. D. 76.

(i) *Smithe v. Smithe*, L. R., 1 P. & M. 587.

(h) *Corrance v. Corrance*, L. R., 1 P. & M. 495.

(k) *Grant v. Grant*, 31 L. J., P. & M. 174.

(l) 20 & 21 Vict. c. 85, s. 7.

(m) *Ibid.* sect. 16.

Ch. VIII. s. 4. Such an order has the effect of a decree of judicial separation (*n*), and may, unless the wife has committed adultery, provide for weekly alimony and the custody of the children.

When refused.

The Court will not grant a judicial separation to a husband, on the ground of his wife's adultery, if he has been guilty of cruelty and desertion (*o*), or to a wife, on the ground of the husband's adultery and cruelty, when she herself has been guilty of a matrimonial offence (*p*).

Not a bar to a petition for divorce.

A decree of judicial separation is no bar to a suit for a divorce, for the matrimonial tie continues, and adultery after the decree may be joined to cruelty before the separation (*q*).

Constitutes wife a *feme sole*.

Where a decree for a judicial separation has been pronounced the wife is by statute to be considered (quite apart from the provisions of the Married Women's Property Act, 1882) as a *feme sole* from the date of the decree, and while the separation continues with respect to property of every description which she may acquire, or which may come to or devolve upon her, and also with respect to any choses in action not reduced into possession at the date of the decree. She can dispose of all such property as though she were a *feme sole*; if she dies intestate, it goes as it would have gone if her husband were dead, and if she returns to cohabitation with her husband, all such property as she may be entitled to when such cohabitation shall take place will, subject to any agreement in writing made between her and her husband while separate, be considered as held to her separate use (*r*). These provisions extend to property to which she has become entitled as executrix, administratrix or trustee since the date of the decree, and to property to which she is entitled in remainder or reversion (*s*). The wife is thus,

Effect on property.

(*n*) 41 & 42 Vict. c. 19, s. 4.

(*o*) *Lempriere v. Lempriere*, L. R., 1 P. & M. 569.

(*p*) *Grossi v. Grossi*, L. R., 3 P. & M. 118.

(*q*) *Green v. Green*, L. R., 3 P. & M. 121; *Bland v. Bland*, 35 L. J., P. & M. 104; *Yeatman v. Yeatman*, 21 L. T. 733.

(*r*) 20 & 21 Vict. c. 85, s. 25; *Johnson v. Lander*, L. R., 7 Eq. 228; *Re Ford*, 33 L. J., Ch. 180; *Re Insole*, L. R., 1 Eq. 470; *In the goods of Worman*, 1 Sw. & T. 513; *In the goods of Faraday*, 2 Sw. & T. 369; *Nicholson v. Drury Buildings Co.*, 7 Ch. D. 48.

(*s*) *Emery's Trusts*, 32 W. R. 357; 21 & 22 Vict. c. 108, ss. 7, 8.

during the separation, considered in law as a *feme sole* for the purposes of contracts, wrongs and injuries, and of suing and being sued (*t*); her husband is not liable on her engagements, contracts or torts, nor is he responsible for any costs she may incur; but if he does not pay the alimony ordered he will be liable for necessities supplied to her (*u*). She can give a good discharge for a legacy paid to her after the decree (*x*), and it puts an end to a restraint on anticipation (*y*).

Ch. VIII. s. 4.

Enables her to sue and be sued.

No discharge, variation or reversal of a decree for judicial separation is to prejudice or affect any rights or remedies which any person would have had in case the same had not been reversed, varied or discharged in respect of any debts, contracts or acts of the wife incurred, entered into or done between the times of the making of the decree, and of the discharge, variation or reversal thereof (*z*).

Whether a decree of judicial separation enables a wife to acquire a separate domicile has not been expressly decided (*a*), but it seems that the presumption of the wife's domicile being that of her husband fails after such a decree (*b*).

Effect on her domicile.

The Court has not, in the case of a decree for a judicial separation, that power to deal with settlements, whether ante-nuptial or post-nuptial, which is conferred on it by statute in the case of a decree for dissolution of marriage (*c*), but where the application for judicial separation is made by the wife, the Court can make any order for permanent alimony, which shall be deemed just (*d*).

Court has no power to deal with settlements, but can order permanent alimony.

(*t*) *Ramsden v. Brearley*, L. R., 10 Q. B. 147.

(*u*) 20 & 21 Vict. c. 85, s. 26.

(*x*) *Re Coward & Adams' Purchase*, L. R., 20 Eq. 179.

(*y*) *Cooke v. Fuller*, 26 Beav. 99; *Munt v. Glynes*, 41 L. J., Ch. 639.

(*z*) 21 & 22 Vict. c. 108, s. 8.

(*a*) *Dolphin v. Robins*, 7 H. L. C. 390.

(*b*) *Williams v. Dormer*, 2 Rob. Ec. Rep. 505; *Le Sueur v. Le Sueur*, 1 P. D. 139.

(*c*) *Gandy v. Gandy*, 7 P. D. 168.

(*d*) 20 & 21 Vict. c. 85, s. 17.

SECTION V.

THE CUSTODY OF CHILDREN AFTER A DECREE FOR A
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Ch. VIII. s. 5. In any suit for a judicial separation or for nullity of marriage, and on any petition for dissolving a marriage, the Court can by interim or other order made before, in or after a final decree, make such provision as it thinks fit, with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the suit or decree, and it can place the children under the protection of the Chancery Division (*e*). If a husband is convicted of an aggravated assault upon his wife, the Court or magistrate before whom he is convicted may give to the wife the legal custody of any children under the age of ten years, provided that the wife has not committed adultery, or, if she has, provided the adultery has been condoned (*f*).

Custody of children.

In cases of aggravated assault.

Time for exercise of power.

The power thus given to the Divorce Court may be exercised as soon as both parties are before the Court (*g*). The discretion given to the Court is wider than that which had been previously exercised by Courts of Law and Equity (*h*), and in dealing with the question, the interests of the children are considered paramount (*i*). It can regulate their custody, until the age of sixteen years (*k*), it will consider the conduct of the

- (*e*) 21 & 22 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4; Rules of the Divorce Court, 104, 195, 212.
- (*f*) 41 & 42 Vict. c. 19, s. 4.
- (*g*) *Stacey v. Stacey*, 29 L. J., P. & M. 63.
- (*h*) *Marsh v. Marsh*, 1 S. & T. 312.
- (*i*) *Boynton v. Boynton*, 2 S. & T. 275; *Ryder v. Ryder*, 30 L. J., P. & M. 44; *Bent v. Bent*, 2 S. & T. 392; *D'Alton v. D'Alton*, L. R., 4 P. D. 87.
- (*k*) *Mallinson v. Mallinson*, L. R., 1 P. & M. 221.

parties, and will not, as a rule, infringe *pendente lite* on the father's right to the custody of his children (*l*). If the wife succeeds in her suit she is generally entitled to the custody of the children (*m*), and where the father is leading a notoriously dissolute life he will probably be held disqualified from having the custody of them (*n*). After a decree of judicial separation in favour of the party in whose custody the children have been placed, the Court may allow other persons to question in their behalf the propriety of the custody (*o*); and the Court will, if it is for the interest of the children to do so, give the custody of them to a third person with access on the part of both parents (*p*).

Ch. VIII. s. 5.

May be given to third parties.

SECTION VI.

PROTECTION ORDER AND ITS CONSEQUENCES.

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By sect. 21 of the Act of 1857 (*q*), a wife deserted by her husband may any time after desertion apply to a police magistrate, to justices in petty sessions, or to the Court for an order to protect any money or property she may acquire by her own lawful industry, and any property of which she may become possessed

Ch. VIII. s. 6.

Protection order under 20 & 21 Vict. c. 85, s. 21.

- (*l*) *Carlidge v. Carlidge*, 2 S. & T. 567; *Barnes v. Barnes*, L. R., 1 P. & M. 463.
- (*m*) *Marsh v. Marsh*, 1 S. & T. 312; *Suggate v. Suggate*, 1 S. & T. 492.
- (*n*) *Hyde v. Hyde*, 29 L. J., P. & M. 150; *March v. March*, L. R., 1 P. & M. 437.
- (*o*) *Godrich v. Godrich*, L. R., 3 P. & M. 134.
- (*p*) *D'Alton v. D'Alton*, 4 P. D. 87; *Chetwynd v. Chetwynd*, L. R., 1 P. & M. 39.
- (*q*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 6.

Ch. VIII. s. 6. after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate, or justices, or Court, if satisfied of the fact of the desertion, that it was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make an order protecting the earnings and property of the wife acquired since the commencement of the desertion, and they will belong to the wife as though she were a *feme sole*. The order must be registered in the County Court; but this provision is directory only, so that a delay in registration will not render it invalid (*r*), and a wife who has obtained such an order is, during the continuance of it, to be during the desertion in the like position in all respects with regard to property, contracts, suing and being sued, as she would be if she had obtained a decree of judicial separation (*s*).

Order should be registered.

Rights of third parties.

A discharge or variation of the order is not to affect any rights of third parties which have been created while it was in force, and persons who act under it are to be indemnified (*t*).

Power to vary or discharge order.

The successors or substitutes of justices or magistrates who made an order can vary or discharge it (*u*), and an application to discharge an order is not limited to the lifetime of the woman who obtained it (*x*).

What constitutes desertion.

Desertion under these sections means that the husband has left his wife without provision (*y*); mere absence in his ordinary occupation is not desertion (*z*); the desertion must continue at the time when the order is made; a *bond fide* offer of the husband to return will destroy the right to an order (*a*); and it must be shown that the wife is maintaining herself by her own industry or property (*b*). The application is made on affidavit stating the facts (*c*); the order should state the time

(*r*) *In the goods of Farraday*, 31 L. J., P. & M. 68.

(*s*) 20 & 21 Vict. c. 85, s. 21.

(*t*) 21 & 22 Vict. c. 108, ss. 8, 10.

(*u*) 27 & 28 Vict. c. 44; see also Rules of the Divorce Court, 124, 125, 197.

(*x*) *Mudge v. Adams*, 6 P. D. 54.

(*y*) *Cargill v. Cargill*, 27 L. J., P. & M. 69.

(*z*) *Ex parte Aldridge*, 1 S. & T. 88.

(*a*) *Cargill v. Cargill*, *supra*; *Ewart v. Chubb*, L. R., 20 Eq. 454; 45 L. J., Ch. 108; *Rudge v. Weedon*, 28 L. J., Ch. 889.

(*b*) *Yeatman v. Yeatman*, L. R., 1 P. & M. 490.

(*c*) *Ex parte Sewell*, 28 L. J., P. & M. 8.

when the desertion commenced, and should be framed in general terms, not mentioning specific property (*d*). It only includes the lawful earnings of lawful trade (*e*), it is retrospective (*f*), but does not enable the wife to maintain an action commenced before the date of the order (*g*). The order extends to property to which the wife has or shall become entitled as executrix, administratrix or trustee, and property to which she is entitled in remainder or reversion (*h*). It also includes a reversionary interest falling into possession after the desertion (*i*). Money refunded after desertion by a liquidator in respect of shares the property of the wife, and registered prior to the desertion in the joint names of herself and her husband (*k*), and a legacy charged on real estate, not reduced into possession before the date of the order, have been held to be property acquired after desertion (*l*). A *feme covert* who has obtained such an order will be ordered the payment of, and can give a receipt for, a legacy given to her in general terms (*m*); and, if an executrix, she is entitled to a transfer of stock standing in the name of her testator without the concurrence of her husband (*n*).

The order entitles the woman to sue as though she were a *feme sole*; and thus she can sue for damages for libel (*o*); it discharges a restraint on anticipation (*p*); it may equally with a decree for a divorce deprive the husband of his right of administration (*q*); it does not deprive the wife of right to alimony *pendente lite* (*r*).

Ch. VIII. s. 6.

What the order includes.

Effect of order.

(*d*) *Ex parte Mullineux*, 27 L. J., P. & M. 19.

(*e*) *Mason v. Mitchell*, 34 L. J., Ex. 68.

(*f*) *Re Ann Elliot*, L. R., 2 P. & M. 274.

(*g*) *Midland Railway v. Pye*, 10 O. B., N. S. 179.

(*h*) 21 & 22 Vict. c. 108, ss. 7, 8.

(*i*) *Re Whittingham*, 12 W. R. 775.

(*k*) *Nicholson v. Drury Buildings Co.*, 7 Ch. D. 49.

(*l*) *Re Coward and Adams' Purchase*, L. R., 20 Eq. 179.

(*m*) *Re Kingsley's Trusts*, 28 L. J., Ch. 80; *Re Rainsdon's Trusts*, 28 L. J., Ch. 334.

(*n*) *Bathe v. The Bank of England*, 4 K. & J. 564.

(*o*) *Ramsden v. Brearley*, L. R., 10 Q. B. 147.

(*p*) *Cooke v. Fuller*, 26 Beav. 99; *Munt v. Glynes*, 41 L. J., Ch. 639.

(*q*) *In the goods of Stephenson*, L. R., 1 P. & M. 287; *In the goods of Hay*, L. R., 1 P. & M. 51.

(*r*) *Hakewill v. Hakewill*, 30 L. J., P. & M. 254.

Ch. VIII. s. 6. A woman who has obtained a protection order is, with regard to property acquired since the desertion, in the same position as a wife who has obtained a decree of judicial separation, so that she can make a will of such property, and, if she die intestate, it will go as though her husband were dead (z).

SECTION VII.

MATRIMONIAL SUITS OTHER THAN SUITS FOR DIVORCE
OR JUDICIAL SEPARATION.

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Ch. VIII. s. 7. The jurisdiction of the Ecclesiastical Courts in suits for nullity of marriage, for restitution of conjugal rights, and for jactitation of marriage, was transferred by 20 & 21 Vict. c. 85, to the Court for Divorce and Matrimonial Causes.

A suit for nullity of marriage may be instituted in the Divorce Division of the High Court for the purpose of obtaining a declaration that a marriage is null and void.

Void marriages.

A marriage is void *ab initio*, if the parties affecting to enter into the contract are under disabilities which prevent them from entering into the contract at all.

Marriages of lunatics.

The marriage of a lunatic, unless contracted in a lucid interval, is null and void (a); so are marriages of persons within the prohibited degrees, of persons already married; and, therefore, of either of the parties to a divorce suit, if the marriage is

(z) *In the goods of Farraday*, 2 S. & T. 369. *Peaty*, L. R., 1 P. & M. 335; and as to lunatics so found by commission, see 15 Geo. 2, c. 30.

(a) Blackstone, cited in *Browning* v. *Reane*, 2 Phill. 69; *Hancock* v.

celebrated before the decree has been made absolute. Marriages are also void, if they have been celebrated without the formalities as to the place or mode of celebration required by the common or statute law; but to render a marriage by banns void, for want of compliance with the provisions of 4 Geo. 4, c. 76, it is necessary that both parties should be aware of the informality (*b*); and in the case of a marriage before a registrar, inaccuracies in the notice given pursuant to 6 & 7 Will. 4, c. 85, have been held not to vitiate the marriage (*c*).

Ch. VIII. s. 7.
Formalities of
and mode of
celebration.

Persons, who by the law of the country of their domicile are under a personal disability to contract marriage, cannot go to another country and there contract a valid marriage (*d*).

To entitle a third party to institute a suit for nullity of marriage, there should be pecuniary interest: mere relationship is not enough; but as parents are bound to maintain their children and grand-children, they have a sufficient interest to enable them to maintain such a suit in respect of their children and grand-children (*e*).

Who may in-
stitute suit.

A marriage will be declared void if either of the parties is impotent, the ground of the interference of the Court being the practical impossibility of consummation (*f*). Generally, cohabitation for three years will be required (*g*); but if absolute impotency is proved *aliunde*, the Court will make a decree without waiting for the lapse of that time (*h*). Wilful wrongful refusal of marital intercourse will not by itself warrant the Court in granting the decree (*i*), but if only curable with great danger to life, a decree of nullity will be made (*k*). Some corroboration of the charge, by medical evidence or inspection, is required, and unreasonable delay, although not an absolute bar

Impossibility
of consumma-
tion.

When delay
a bar.

(*b*) *R. v. Wroxtton*, 4 B. & Ad. 640; *Templeton v. Tyree*, L. R., 2 P. & M. 420; *Fendall v. Goldsmid*, 2 P. D. 263; *Greaves v. Greaves*, L. R., 2 P. & M. 423; *Gompertz v. Kensit*, L. R., 13 Eq. 369.

(*c*) *Holmes v. Simmons*, L. R., 1 P. & M. 523.

(*d*) *Sottomayor v. De Barros*, 3 P. D. 1.

(*e*) *Bevan v. McMahon*, 2 S. & T.

58; *Sherwood v. Ray*, 1 Moo. P. O. C. 397; 43 Eliz. c. 2; 45 & 46 Vict. c. 75, s. 21.

(*f*) *G. v. G.*, L. R., 2 P. & M. 287; *D. v. A.*, 1 Rob. 792.

(*g*) *Scott v. Jones*, 2 N. C. 38.

(*h*) *F. v. D.*, 4 S. & T. 86; *L. v. L.*, 7 P. D. 16; *Welde v. Welde*, 2 Lee, 580.

(*i*) *S. v. A.*, 3 P. D. 72.

(*k*) *W. v. H.*, 30 L. J., P. & M. 73.

Ch. VIII. s. 7. to that suit, is a formidable obstacle to its success (*l*), for the relief will not be granted unless promptly sought (*m*). Impotency renders the marriage void *ab initio*, but the impotent party cannot institute the suit (*n*), nor can a marriage be impeached on this ground after the death of one of the parties (*o*). The decree is like a decree for a divorce, only a decree nisi in the first instance, and if collusion is proved it will not be made absolute (*p*).

Impotent party cannot institute suit.

Collusion a bar.

Restitution of conjugal rights. Application for restitution of conjugal rights may be made by petition to the Court, and the Court may, if satisfied of the truth of the allegations contained in the petition, and that there is no legal ground why the decree should not be made, grant a decree of restitution (*q*). A written demand for cohabitation must first be made, and the respondent may, if willing to return to cohabitation, obtain a stay of proceedings (*r*). The only ground for a petition of this nature is that one party has withdrawn from cohabitation without lawful excuse; the Court cannot entertain the petition if there is cohabitation (*s*), but if there has been withdrawal, then the petitioner is entitled to a decree, unless the respondent can prove some matrimonial offence which would be a ground for a decree of judicial separation (*t*). Mere improprieties on the part of a wife form no defence (*u*); but a wife who has committed adultery cannot obtain a decree, even though the husband has also committed adultery (*x*). Impotency is a sufficient answer to such a petition, as the validity of the marriage is thereby denied (*y*). It was for some time doubtful whether a separation deed could be pleaded in answer to such a petition, although it afforded a good answer to a charge of unjustifiable absence,

Withdrawal from cohabitation the ground for petition.

Plea of separation deed valid.

- (*l*) *R. v. R.*, 1 P. D. 405. (*t*) *Scott v. Scott*, 34 L. J., P. & M. 23; *Burroughs v. Burroughs*, 2 S. & T. 303; *Dysart v. Dysart*, 1 Rob. 106.
- (*m*) *Cuno v. Cuno*, L. R., 2 H. L. Sc. App. 300. (*u*) *Rippingall v. Rippingall*, 24 W. R. 967.
- (*n*) *Norton v. Seton*, 3 Phill. 147. (*x*) *Hope v. Hope*, 27 L. J., P. & M. 43; 1 S. & T. 94.
- (*o*) *A. v. B.*, L. R., 1 P. & M. 559. (*y*) *Ricketts v. Ricketts*, 35 L. J., P. & M. 92.
- (*p*) 36 & 37 Vict. c. 31.
- (*q*) 20 & 21 Vict. c. 85, s. 17.
- (*r*) Rules 175, 176.
- (*s*) *Pearson v. Pearson*, 33 L. J., P. & M. 156; *Orme v. Orme*, 2 Add. 382.

but it is now settled that it can; and it is an *a fortiori* case, Ch. VIII. s. 7.
that if it contain an agreement that no suit for the restitution of
conjugal rights shall be instituted, the parties to the agree-
ment will be held bound, and a petition presented by either will
be dismissed (s). A petition for restitution of conjugal rights
is not the appropriate remedy for desertion (a).

The duty of the Court to issue an attachment for non-com-
pliance with a decree for the restitution of conjugal rights is the
same since the Divorce Acts as it was before, and a husband
does not comply with the order by providing for his wife a
suitable house, and a sufficient income, unless he resides in the
house with her (b).

Jactitation of marriage is when "one of the parties boasts or Jactitation of
marriage.
gives out that he or she is married to the other, whereby a
common reputation of their matrimony may ensue. On this
ground the party injured may libel the other in a Spiritual Court,
and unless the defendant undertakes and makes out proof of the
actual marriage he or she is enjoined perpetual silence on that
head" (c).

To such an action, which is now of very rare occurrence, the
respondent may answer by denying the charge, may prove a
marriage, or may allege that the petitioner has allowed the
respondent to assume the married character, and, in such a case,
the Court has refused to pronounce a sentence of malicious
jactitation (d). A decree of perpetual silence was made against
the jactitator in the case of an informal Jewish marriage (e).
Such a suit can only be instituted by one of the parties to the
alleged marriage (f), unless the complainant be a minor, in
which case the guardian has been allowed to maintain the

The suit can
be brought
only by party
to the alleged
marriage.

(s) *Marshall v. Marshall*, 5 P. D.
19; *Anquez v. Anquez*, L. R., 1 P.
& M. 176; *Wilson v. Wilson*, 1 H.
L. Ca. 572; *Besant v. Wood*, 12 Ch.
D. 605.

(a) *Drysdale v. Drysdale*, L. R.,
1 P. & M. 365; 36 L. J., P. & M.
39.

(b) *Weldon v. Weldon*, 9 P. D. 52.
A bill has been introduced into Par-

liament in the present session (1884)
to alter the law in that respect.

(c) 3 Blackst. Comm. 93.

(d) *Hawke v. Corri*, 2 Hagg. Cons.
280; *Bodkin v. Case*, Milward's Ir.
Ecc. Rep. 355.

(e) *Goldsmid v. Bromer*, 1 Hagg.
Cons. 324.

(f) *Ex parte Campbell*, 31 L. J.,
P. & M. 60.

Ch. VIII. s. 7. *When sentence in this suit evidence.* *suit (g).* A sentence of jactitation has been received upon a title in ejectment as evidence against a marriage, and in personal actions founded on a supposed marriage; but it was not admitted as conclusive evidence in a criminal case so as to stop a prosecution founded on a charge of bigamy (*h*).

SECTION VIII.

ALIMONY AND MAINTENANCE.

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Ch. VIII. s. 8. *Alimony.* Alimony is an allowance made to a wife out of her husband's means for her support, either during a matrimonial suit or after its termination.

A wife, who sued for a divorce, was always treated as a privileged suitor, as regards maintenance and costs, for the reason that all her property was presumed to vest in her husband, so that provision was made for her in the Ecclesiastical Court, by allowing her alimony during the pendency of the suits which could be brought in those Courts, and by providing in proper

(*g*) *Buller v. Dolben*, 2 *Lee*, 312. (*h*) *The Duchess of Kingston's case*, 2 *Sm. L. C.*, 8th edit. p. 784.

cases permanent alimony or maintenance for her after the suit had been determined. Ch. VIII. s. 8.

The Act (i), which established the Divorce Court, empowered it in granting a decree for a divorce to secure to the wife such a gross or annual sum of money as should be reasonable, regard being had to her fortune, to the ability of the husband, and to the conduct of the parties, and gave it the same power to make interim orders for the payment of money during the pendency of a petition, as it would have in a suit for a judicial separation. It has since been enacted (j) that the Court may, in such cases, order the husband to make monthly or weekly payments to his wife, and the amount may from time to time be varied (k). In the Divorce Court.
Weekly or monthly payments may be ordered.

A wife, who is a petitioner in a cause, may present a petition for alimony *pendente lite* as soon as the citation in the principal suit has been served, or as soon as an order dispensing with service has been made, and a wife who is a respondent may do so after having entered an appearance (l); and, when once the marriage is established as a fact, she is entitled to alimony *pendente lite*, unless her husband has no means, or she has sufficient means of her own (m). Nothing is allowed to interfere with the *prima facie* right, so that the fact that a wife is imprisoned for felony does not affect it (n); and a deed intended to convey all the property of the husband against whom a suit for a divorce is pending will be set aside (o). For this purpose the wife is considered an innocent party, notwithstanding any allegations charging her with adultery (p). A plea to the jurisdiction of the Court does not affect the power of the Court to allow such alimony (q). Alimony pendente lite.
Wife for this purpose considered innocent.

Alimony will not be given if the husband is not shown to have present income; an expectation of future income will not Husband must have present income.

(i) 20 & 21 Vict. c. 85, s. 32; 29 & 30 Vict. c. 32, s. 1. See also Rules of the Divorce Court, 81 to 103, 189, 190, 204.

(j) 29 & 30 Vict. c. 32, s. 1. The order cannot be made in the alternative, *Medley v. Medley*, 7 P. D. 122.

(k) *Jardine v. Jardine*, 6 P. D. 213.

(l) Rules of the Divorce Court, 81, 82 *et seq.*

(m) *Miles v. Chilton*, 1 Robertson, 684, at p. 700.

(n) *Kelly v. Kelly*, 32 L. J., P. & M. 181.

(o) *Blenkinsopp v. Blenkinsopp*, 1 De G., M. & G. 495.

(p) *Crampton v. Crampton*, 32 L. J., P. & M. 142.

(q) *Ronalds v. Ronalds*, L. R., 3 P. & M. 259.

Ch. VIII. s. 8. suffice (*r*); but it will be allotted on his average annual earnings, although he may at the moment be out of employment (*s*).
 Wife must not have independent property. It will not be allotted, if the wife has sufficient independent property of her own, if she has been living apart from her husband, has been and is still able to support herself by her own earnings (*t*); nor if she is living with another man and is supported by him (*u*); nor will it usually be allotted by way of an increased allowance to a wife who is separated from her husband and who receives an annuity under the separation deed (*x*). The amount given by the Ecclesiastical Courts was generally one-fifth of the husband's net income; but the circumstances of each case, such as the nature of the property, the expenses of supporting the children of the marriage, and the extravagance of the wife, are taken into account (*y*). The fact that the husband has to support his children by a prior marriage makes no difference in the amount allotted (*z*), nor will it be increased if the wife supports the children of the marriage, as in such a case she should apply for maintenance for them under sect. 35 of the Act of 1857.

Amount regulated by circumstances of each case.

When payable.

Ceases when wife's adultery established.

Arrears must be paid.

The alimony, if allotted, is payable from the service of the citation (*a*); and where the wife is the respondent in a suit in which adultery is charged, it ceases when the adultery is established (*b*); but if there are arrears, the Court will not make a decree nisi obtained by the husband absolute until the arrears are paid (*c*), and alimony will continue to be payable to her during an appeal, unless it is merely frivolous and vexatious (*d*);

(*r*) *Fletcher v. Fletcher*, 2 S. & T. 434; 31 L. J., P. & M. 82; *Brown v. Brown*, 3 S. & T. 217; 32 L. J., P. & M. 144; *Gaynor v. Gaynor*, 31 L. J., P. & M. 116.

(*s*) *Thompson v. Thompson*, L. R., 1 P. & M. 553.

(*t*) *Goodheim v. Goodheim*, 2 S. & T. 250; 30 L. J., P. & M. 162; *Coombs v. Coombs*, L. R., 1 P. & M. 218; *Burrows v. Burrows*, L. R., 1 P. & M. 553; *George v. George*, 32 L. J., P. & M. 17.

(*u*) *Holt v. Holt*, L. R., 1 P. & M. 610.

(*x*) *Powell v. Powell*, L. R., 3 P. & M. 186.

(*y*) *Hawkes v. Hawkes*, 1 Hag. 526; *Harris v. Harris*, 1 Hag. 351.

(*z*) *Hill v. Hill*, 33 L. J., P. & M. 104.

(*a*) *Nicholson v. Nicholson*, 31 L. J., P. & M. 165.

(*b*) *Madan v. Madan*, 19 L. T., N. S. 612; *Wells v. Wells*, 3 S. & T. 542; 33 L. J., P. & M. 151.

(*c*) *Latham v. Latham*, 30 L. J., P. & M. 163; 2 S. & T. 299. See *Ellis v. Ellis*, 8 P. D. 188.

(*d*) *Jones v. Jones*, L. R., 2 P. & M. 333.

nor, if the wife use due diligence in claiming alimony, will the husband be allowed to withdraw his petition, until he has paid the alimony allotted to her up to the time of withdrawal (*e*); but although no order will be made after a decree nisi, if the wife has been unnecessarily tardy in filing her petition for alimony (*f*), yet, after a decree nisi, and before a decree absolute, the suit is still pending, so that alimony *pendente lite* can during that period be granted (*g*). Ch. VIII. s. 8.
Can be given after decree nisi.

The terms maintenance and permanent alimony are generally used, the former when the decree is for the dissolution of the marriage, the latter when the decree is for the relief sought in the other suits, the jurisdiction over which has been transferred from the Ecclesiastical Courts to the Divorce Division. Maintenance and permanent alimony.

The petition for maintenance should be filed after the decree nisi, and before the decree absolute (*h*); but the Court has power to make the order after the decree absolute has been pronounced (*i*). Petition for after decree nisi.

The amount to be allotted as maintenance in the case of a dissolution of marriage is in the discretion of the Court (*k*), regard being had to the fortune of the wife, the ability of the husband, and the conduct of the parties; it can allot a gross sum, or order an annual, monthly or weekly payment to be made, and the principle on which the Court acts is, that a wife is not to be left destitute, but that she is not to gain greatly by the decree of dissolution, and that she shall enjoy it *dum casta et sola vixerit* (*l*). Principle on which it is allotted.

In granting permanent alimony in cases which were formerly within the cognizance of the Ecclesiastical Courts, the Court of Divorce follows, and is guided, by the rules and principles which prevailed in those Courts (*m*). The petition may be filed after the final decree (*n*); the amount allotted is larger than that Permanent alimony, principles of Ecclesiastical Courts followed.

(*e*) *Twistleton v. Twistleton*, L. R., 2 P. & M. 339.

(*f*) *Noblett v. Noblett*, L. R., 1 P. & M. 651.

(*g*) *Ellis v. Ellis*, 8 P. D. 188; S. v. B., 53 L. J., P. D. & A. 63.

(*h*) Rules of the Divorce Court, 95, 96; *Charles v. Charles*, L. R., 1 P. & M. 260.

(*i*) *Sidney v. Sidney*, 36 L. J., P. & M. 73; *Bradley v. Bradley*, 3 P. D. 47.

(*k*) 20 & 21 Vict. c. 85, s. 32.

(*l*) *Fisher v. Fisher*, 31 L. J., P. & M. 1; 2 S. & T. 410.

(*m*) *Haigh v. Haigh*, L. R., 1 P. & M. 709.

(*n*) *Covell v. Covell*, L. R., 2 P. & M. 411.

Ch. VIII. s. 8. allowed *pendente lite*, and may amount to, but must not exceed, a moiety of the joint income (*o*). The conduct of the parties, the means possessed by the wife (*p*), and the necessary expenses incurred by the husband in earning his income (*q*), will all be taken into account; but in the absence of proof that the husband's income has altered, the income, on which alimony *pendente lite* was granted, will be taken as the basis for the permanent alimony (*r*). If it has diminished, he should bring the fact before the Court on affidavit (*s*); if the wife desires to show it has increased, or that her own means have diminished, she should file a petition to that effect (*t*).

Is given from date of decree.

A sum may be given absolutely.

Permanent alimony is generally given from the date of the decree. The Court will not order a husband to execute a deed charging his property with the payment of permanent alimony (*u*); but where his conduct was considered to render it necessary, he was ordered to secure to his wife the payment of a sum absolutely (*x*); and the Court will authorize sequestrators to receive portions of a pension in order to enforce payment of alimony (*y*). Where the parties are separated because of the cruelty of the wife, alimony was formerly not granted (*z*).

A wife who has agreed to a sum for separate maintenance, is not thereby precluded from obtaining permanent alimony after a divorce granted for offences committed after the agreement (*a*).

An order makes the wife a judgment creditor.

An order for alimony makes the wife a judgment creditor of the husband (*b*). Savings out of alimony can be disposed of by will (*c*).

(*o*) *Haigh v. Haigh*, L. R., 1 P. & M. 709; Rules of Divorce Court, 189 *et seq.*

(*p*) *Eaton v. Eaton*, L. R., 2 P. & M. 51.

(*q*) *Louis v. Louis*, L. R., 1 P. & M. 230.

(*r*) *Greenwood v. Greenwood*, 32 L. J., P. & M. 136; *Moore v. Moore*, 3 S. & T. 606.

(*s*) *Davies v. Davies*, 32 L. J., P. & M. 152.

(*t*) *Fisk v. Fisk*, 31 L. J., P. & M. 60.

(*u*) *Hyde v. Hyde*, 34 L. J., P. & M. 63; 4 S. & T. 80.

(*x*) *Morris v. Morris*, 31 L. J., P. & M. 33.

(*y*) *Sansom v. Sansom*, 4 P. D. 69; *Dent v. Dent*, L. R., 1 P. & M. 366. If the pension is not assignable, no order will be made. *Birch v. Birch*, 8 P. D. 163.

(*z*) *Dart v. Dart*, 32 L. J., P. & M. 125; 3 S. & T. 208. See, however, *Prichard v. Prichard*, 3 S. & T. 523.

(*a*) *Morrall v. Morrall*, 6 P. D. 98.

(*b*) *Oliver v. Lowther*, 42 L. T. 47.

(*c*) *Moore v. Barber*, 34 L. J., Ch. 667.

As a general rule, a husband is liable for his wife's costs, and he must pay all the reasonable costs of conducting his wife's case (*d*). The law assumed that all the property of the wife passed to her husband, so that in many cases the wife not only does not pay costs, but she litigates at the expense of her husband; but if she has separate property, there is no reason why she should not be made to pay costs like any other suitor (*e*).

Ch. VIII. s. 8.

Liability of husband for wife's costs.

In the Ecclesiastical Courts the wife was entitled to have her costs taxed *de die in diem*, and the practice in those Courts, where the evidence was taken by affidavit, was to tax and pay the wife's costs before trial, without limiting the amount to any sum deposited by the husband as security (*f*). According to the present practice, the husband is required to deposit in Court or to give security for a sum of money to answer the wife's costs properly incurred (*g*); and when the decision is against the wife, no costs of or incidental to the hearing or trial are to be allowed against the husband, except such as may be applied for and ordered to be allowed by the judge at the hearing or trial (*h*). This rule gives the Court a reasonable discretion in the matter of costs, but even if the wife fail in a suit, costs ought only to be refused to her where her solicitor has instituted an unreasonable suit (*i*). And the Court of Appeal held that where a husband obtained a decree nisi for a divorce, still he ought to pay all his wife's costs properly incurred in defending herself (*k*); but if application is made for the payment of the full costs of a wife who has been found guilty, the Court will postpone its decision until her costs have been taxed (*l*). A wife who has obtained a decree nisi with costs is entitled to enforce payment of those costs, notwithstanding the intervention of the Queen's

Deposit or security by husband required.

- (*d*) *Wells v. Wells*, 1 S. & T. 308; *Smith*, 7 P. D. 227.
Chetwynd v. Chetwynd, 34 L. J., Mat. 65. (*g*) Rules of the Divorce Court, 158.
(*e*) *Milne v. Milne*, L. R., 2 P. & M. 202; *Miller v. Miller*, L. R., 2 P. & M. 13. (*h*) Rules of the Divorce Court, 159.
(*f*) *Keats v. Keats*, 1 S. & T. 334; 28 L. J., P. & M. 57; *Robertson v. Robertson*, 6 P. D. 119; *Smith v. Smith*, 7 P. D. 84. (*i*) *Flower v. Flower*, L. R., 3 P. & M. 132.
(*k*) *Robertson v. Robertson*, *supra*.

Ch. VIII. s. 8. **Costs where wife has separate property.** Proctor before it is made absolute (*m*). An application for the wife's costs can be entertained in a meritorious case after the trial if there are special grounds for the delay (*n*). If the wife has separate property, the rule no longer remains the same, for the Court has power to order a wife who is petitioner to give security for costs (*o*). A wife possessing separate property, who failed in her suit for a judicial separation, was not allowed costs, although security had been given (*p*); and in a suit for restitution of conjugal rights, a wife possessing separate property was held liable for her own costs (*q*).

(*m*) *Gladstone v. Gladstone*, L. R.,
3 P. & M. 260.

(*n*) *Somerville v. Somerville*, 36 L.
J., P. & M. 87; *Conradi v. Conradi*,
L. R., 1 P. & M. 163.

(*o*) *M. v. De B.*, 33 L. T. 263.

(*p*) *Heal v. Heal*, 36 L. J., P. &
M. 62.

(*q*) *Holmes v. Holmes*, 2 Lee, 90.

Part Second.

Showing the Operation of General Rules when affected by Special Stipulation.

CHAPTER IX.

ANTE-NUPTIAL AGREEMENTS.

SECTION I.

OF PROMISES TO MARRY.

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HAVING discussed the Rights and Liabilities of Husband and Wife according to the general Law of the Land, we now proceed to consider those Rights and Liabilities when controlled or affected by special stipulation. And here it may be observed, that the parties to marriage contracts (as, indeed, to other contracts) will take by law all the rights, and will

Ch. IX. s. 1.

Ch. IX. s. 1. be under all the liabilities, from which special stipulation does not exclude them. So that, in considering cases of special stipulation, it will be necessary to keep constantly in view those "general rules" which have been discussed in the first part of this treatise.

Special stipulations may be either by ante-nuptial or by post-nuptial agreement.

Distinction between promises to marry and promises in consideration of marriage.

To begin, then, with ante-nuptial agreements,—the Statute of Frauds, section 4, enacts:—

That no action shall be brought whereby . . . to charge any person upon any agreement made upon consideration of marriage . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

And yet a promise *to marry* (which in this respect is very distinguishable from a promise *in consideration of marriage*), is binding, although merely verbal (*a*).

The ground of this distinction, though solid, is not immediately apparent (*b*). For the purpose of elucidation, therefore, a few words may be said respecting promises to marry, before entering on the examination of promises and agreements in consideration of marriage.

Promises to marry, however expressed, and whether oral or written, always point at one object—an object definite and certain. Consequently, there never can be any difficulty in saying what it is that the promising parties are to perform. This is perhaps one reason why the law is satisfied with parol proof of a promise to marry. Another reason seems to be, that to insist on having written evidence, would, in many instances, prove an encouragement to perfidy. Be this, however,

(*a*) *Cork v. Baker*, 1 Str. 34; *Harrison v. Cage*, 1 Raym. 386. By these cases it has been decided that an agreement between two persons to marry is not an agreement in consideration of marriage, but that these terms are confined to promises to do something in consideration of marriage, *other* than the perform-

ance of the contract of marriage itself.

(*b*) "It would certainly strike any one (except perhaps a lawyer) that a promise by a woman to marry a man, in consideration of his promising to marry her, was an agreement made in consideration of marriage."

—*Smith on Contracts*.

as it may, nothing is better established now (c) than that a parol, or verbal promise to marry, is binding. But specific performance cannot be compelled; the sole remedy for breach of a promise to marry being the recovery of damages for non-performance. And such damages are alike recoverable, whether the promise be established by oral testimony or by written evidence.

Ch. IX. s. 1.

Remedy on promise to marry.

This remedy by way of damages for breach of promise (which many think a discredit to our institutions), is not of very ancient date in the law. It seems to have been unknown to Lord C. J. Vaughan (who presided in the Court of Common Pleas from 1668 to 1674); for we find that eminent judge expressing a doubt whether *any* action could be maintained on mutual promises to marry (d). Such promises are not to be confounded with the ancient promise of marriage *de futuro cum copulâ*, which, as we have seen, gave ground for a suit in the Spiritual Court to compel solemnization *in facie ecclesiæ* (e); for the promise *de futuro cum copulâ* constituted *ipsum matrimonium*; whereas a promise to marry in modern times acquires no additional force from a *copula*, and, since the passing of Lord Hardwicke's Act (f), is neither in itself a marriage, nor warrants any ecclesiastical process to compel solemnization.

Remedy not of ancient date.

In short, it warrants nothing but an action at law for the recovery of damages when a breach has been committed.

By 32 & 33 Vict. c. 68, it is provided that the parties to any action for breach of promise of marriage shall be competent to give evidence in such action, and it also enacts, that no plaintiff in such an action shall recover unless his or her testimony shall be corroborated by some other material evidence in support of the promise (g).

Parties to action competent to give evidence.

(c) This was not so always; for not long after the passing of the Statute of Frauds, it was decided that a promise to marry (like a promise in consideration of marriage), must be in writing and signed. See *Philpot v. Wallet*, 3 Lev. 65. But that case is no longer law.

(d) *Holt v. Ward Clarendieux*, 2 Str. 937. The action of crim. con.

is apparently more modern still; the first instance being that of the *Duke of Norfolk v. Sir J. Jermayne*, in 1692. See Lord Campbell's "Lives of the Chancellors," vol. iv. p. 106.

(e) See *ante*, p. 5.

(f) See *ante*, p. 6.

(g) *Bessela v. Stern*, 2 C. P. D. 285.

Ch. IX. s. 1.

Promise to
marry simply.
Conditional
promise.

Expressions
of intention.

Acceptance
necessary.

Tender of per-
formance by
plaintiff.

When de-
fendant has
married
another.

Discovery
that the

A promise to marry, without more, means a promise to marry within a reasonable time; otherwise no breach could be assigned (*h*).

A conditional promise must be laid as such; and it must be shown that the condition has been performed (*i*).

Expressions of intention in the hearing of third persons will not support an action, unless authorized to be communicated; and then they will amount to a promise (*k*).

It is a general rule in all contracts that both parties must be bound, or neither. Therefore, where an action is brought for breach of a marriage promise, acceptance of the promise must be alleged and proved. But this acceptance may be established by conduct and action as well as by words (*l*).

However, it seems necessary, before bringing an action, to make a tender of performance on the part of the promisee. The maker of the promise should be required to fulfil it. The requisition, however, need not be by the female plaintiff. If made by her father it will suffice (*m*).

The maker of the promise may, in the meantime, have married another. In such a case, it is no defence to say that he was never requested to perform his promise; he having, by his marriage, put himself in a situation which rendered performance impossible (*n*).

But suppose him to contend that should his wife die leaving him surviving, he may still be able to perform his promise, "within a reasonable time." That likewise is no defence; for the Court will not presume that his wife is to die within a "reasonable time," or even in his lifetime (*o*).

If the man, after the promise, discover that the woman is

(*h*) *Potter v. De Boos*, 1 Stark. Ca. 82.

(*i*) *Cole v. Cottingham*, 8 Car. & P. 75.

(*k*) *Ibid*.

(*l*) *Gough v. Farr*, 2 Car. & P. 631; *Harvey v. Johnston*, 17 L. J., C. P. 298; *Hutton v. Mansell*, 6 Mod. 172.

(*m*) *Ibid*.

(*n*) *Caines v. Smith*, 15 M. & W. 189. See also *Short v. Stone*, 8 Q.

B. Rep. 358, where it was held not necessary to aver that the other woman whom the defendant had married was still living, he having, by his marriage, broken his contract with the plaintiff. A refusal to perform the contract before the time of performance has arrived is a breach of the contract and will support an action. *Frost v. Knight*, L. R., 7 Ex. 111.

(*o*) *Caines v. Smith*, 15 M. & W. 189.

unchaste, he may refuse to marry her (*p*). But if her frailties were known to him at the time of the promise, he cannot plead them as a defence to an action (*q*). Ch. IX. s. 1.
woman is
unchaste.

How far bad health on the part of the plaintiff seeking damages is a defence to the action, the Courts have more than once had occasion to consider. In *Atchinson v. Baker* (*r*) (a case in which the man was plaintiff and the woman defendant), it appeared that when she gave her promise the plaintiff seemed in good health; but she afterwards discovered that he had an abscess on his breast, and for that reason she refused to marry him. Lord Kenyon held that she was justified. How far bad
health a
defence.

It is the duty of the man, in such circumstances, to disclose his malady. If he conceal it, he ought not to be allowed to recover damages. But there is no duty to disclose that the party had at one time been of unsound mind (*s*).

The woman, too, is bound to a like degree of candour. But this, of course, does not imply that the parties are to divulge every little insignificant personal peculiarity to which each may be subject. The obligation must be viewed with reference to the reason of the thing; having a due regard to the objects of matrimony, and the endurance and closeness of the connexion. A woman knows that she and her children will be dependent on her husband in the married state. She has, therefore, a right to find him sound, unless, when she promised, she knew of his blemishes or defects. But objections of this kind must not be fanciful or speculative.

In *Hall v. Wright* (*t*), the majority of the Court of Exchequer Chamber held, that a party cannot set up as an excuse for breach of promise to marry that the performance of the conjugal duties would be dangerous to his life, and that such a plea discloses no good defence to the plaintiff's claim for damages; for it is for the woman to say whether she will in such a case enforce or renounce the contract (*u*).

(*p*) *Bench v. Merrick*, 1 Car. & Kir. 463; *Beachey v. Brown*, 1 E. B. & E. 796.

(*q*) *Ibid.*

(*r*) *Peake*, Ad. Ca. 103, 104.

(*s*) *Baker v. Cartwright*, 10 C. B., N. S. 124.

(*t*) E. B. & E. 746.

(*u*) See *Boast v. Firth*, L. R., 4 C. P. 1, at p. 8.

Ch. IX. s. 1.

"The better opinion now appears to be," as stated in Chitty on Contracts (x), "that no infirmity, bodily or mental, which may supervene or be discovered after the making of a contract to marry, unless it be *incapacity* on the part of the man or *want of chastity* on the part of the woman, can be replied upon by either as a ground for refusing to perform such contract" (y).

Defendant a married man at time of promise—no defence.

Case of plaintiff being an infant.

The fact that the defendant was married to another woman at the time when he made the promise to the plaintiff is no defence to an action for damages for breach of promise of marriage (z).

An infant may bring an action against an adult for breach of promise to marry. This was doubted till the determination of the Court of King's Bench in *Holt v. Ward Clarencieux* (a); where Lord C. J. Raymond said, that the contract by mutual promises of marriage, one of the parties being an infant, "is not void, but merely voidable at the election of the infant; and, as to the person of full age, it absolutely binds" (b). But it must be remembered that an infant's marriage is required by the statute to be with consent of guardians (c). So that the want of such consent (when applied for) would most probably be a good defence to an infant's action claiming damages from an adult promisor, because an infant's marriage, without consent of guardians, although not absolutely void, is nevertheless interdicted by the law.

Infants' Relief Act.

The Infants' Relief Act, 1874 (d), enacts, that no action shall be brought whereby to charge any person upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. It has been decided that this section applies to promises to marry (e); but the distinction between a fresh promise made after full age and a mere ratification or recognition of the promise made while a

(x) Page 491, 7th ed.

(y) See *Hall v. Wright*, E. B. & E. 746; *Baker v. Cartwright*, 10 C. B., N. S. 124.

(z) *Wild v. Harris*, 7 C. B. 999; *Milward v. Littlewood*, 5 Ex. 775.

(a) 2 Strange, 937. See 1 Barn. 290.

(b) As to void and voidable contracts, see *Fenton v. Livingstone*, 3 Macq. H. L. C. 497.

(c) *Supra*, p. 12.

(d) 37 & 38 Vict. c. 62, s. 2.

(e) *Coxhead v. Mullis*, 3 C. P. D. 439.

minor, which is consequently void and not merely voidable, may Ch. IX. s. 1. not always be clear or easy of appreciation (*f*).

Contracts in restraint of marriage are void as being against public policy (*g*); and general conditions prohibiting marriage, by which a legacy is cut down, are also void if they refer to personal estate or to a mixed fund, but not if they refer to realty (*h*). Particular conditions of restraint are valid as to real estate, and as to personal estate if there be a gift over (*i*).

Contracts and covenants in restraint of marriage.

A covenant, however, to give a woman an annuity of 40% until her marriage, and afterwards only 20%, was held not to be a covenant in restraint of marriage (*k*); and a restriction may be placed on the second marriage of either a man or woman, by making the benefit of a bequest by whomsoever made, determine on a second marriage (*l*).

(*f*) *Ditcham v. Worrall*, 5 C. P. D. 410; *Northcote v. Doughty*, 4 C. P. D. 385.

(*g*) *Lowe v. Peers*, 4 Burr. 2225; *Baker v. White*, 2 Vern. 215. And *Hartley v. Rice*, 10 East, 22.

(*h*) *Bellairs v. Bellairs*, L. R., 18 Eq. 510; *Lloyd v. Lloyd*, 2 Sim., N. S. 255.

(*i*) *Jenner v. Turner*, 16 Ch. D. 188; *Jones v. Jones*, 1 Q. B. D. 279; *Topham v. Duke of Portland*, L. R., 5 Ch. 40.

(*k*) *Webb v. Grace*, 2 Ph. 701.

(*l*) *Lloyd v. Lloyd*, 2 Sim., N. S. 255; *Newton v. Marsden*, 2 Johns. & N. 356; *Allen v. Jackson*, 1 Ch D. 399.

SECTION II.

ANTE-NUPTIAL AGREEMENTS—REQUIREMENTS OF THE
STATUTE OF FRAUDS.

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Ch. IX. s. 2.

Policy of the statute requiring written evidence of the agreement.

In dealing with agreements, in consideration of marriage, the first thing to be ascertained is, whether there has been compliance with the provisions of the Statute of Frauds; the 4th section of which requires that such agreements shall be in writing, and signed by the party to be charged therewith. The object of this enactment is to guard against the danger of admitting parol evidence in matters very liable to be misapprehended and misconstrued, and consequently very likely to give rise to perjury and fraud. It may indeed be asked, Are not these consequences just as likely to happen in the case of promises to marry? But promises to marry, as before remarked, are in their nature uniform and certain; whereas agreements in consideration of marriage are of endless variety, and would in almost every case produce a conflict of oral testimony. The policy of the statute is indeed rested on a different basis, in the well-known case of *Montacute v. Maxwell*, before Lord Chancellor Macclesfield. There it was contended that the object of the clause was to protect parties from being bound by those unguarded verbal declarations which are common in courtships, “since in no case can there be supposed so many expressions and promises used, as in addresses in order to marriage, where many

passages of gallantry usually occur" (m). But this is somewhat lax morality, which we ought not to attribute to the legislature; for the act was made, as its preamble declares, not to promote "passages of gallantry," but to repress perjuries and frauds.

Ch. IX. s. 2.

The words of the 4th section are as follows:—

That no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Although these words point at *legal* remedies, they always received the same construction, in Courts of Equity as in Courts of Law. Unless, therefore, there be a writing duly signed, no action can be brought to enforce an agreement in consideration of marriage.

Of equal force in equity as at law.

The signature of the plaintiff is not necessary. The name to be signed is that of the party charged, or his agent. It is not necessary that it should be placed at the end of the document: it is sufficient if it appears in some material governing part of the instrument (n).

Rule as the signature of the note or memorandum.

It has been decided that the consideration, as well as the promise, must appear in the writing (o). The consideration of marriage, however, is a favourite of the law (p); which regards

Necessary that the consideration, as well as the agreement, shall appear in it.

(m) *Montacute v. Maxwell*, 1 P. Wms. at p. 619.

(n) In *Hammersley v. De Biel*, 12 Cla. & Fin. 45, one of the questions was, whether there was sufficient signature of certain articles to bind the father of the lady. Lord Cottenham said, "The father's name is in one place written at length by one son, and in the other by initials only, by the other son; and as it is clearly immaterial in what place the signature of the name is to be found, it is, in the terms of the Statute of Frauds, an agreement made in consideration of marriage, of which there is a memorandum or note in writing, signed by a person thereunto lawfully authorized by the

party to be charged therewith." See *Caton v. Caton*, L. R., 2 H. L. 127.

(o) *Wain v. Warlters*, 5 East, 10; and see *Randall v. Morgan*, 12 Ves. 67, where Sir William Grant says that the 4th section requires the very agreement to be in writing; which he tells us is not necessary in the case of a trust under the 7th section—for it is enough if a trust be manifested without being actually constituted by writing.

(p) "If it be supposed to be necessary to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum, or in the other

Ch. IX. s. 2. that contract as, *per se*, so important and all-sufficient, that the amount of pecuniary benefit, moving from either side, is deemed immaterial (*q*). Accordingly, if a father, on his son's marriage, were to convey an estate to him in fee, the son would be considered a purchaser for valuable consideration, although nothing actually lucrative passed to the father (*r*).

Need not be
in a single
writing.

The agreement need not be contained in a single writing (*s*). It may be collected from several; provided that the connection and meaning of the whole can be clearly made out without calling in the aid of oral testimony (*t*).

How far
verbal pro-
mises will be
enforced.

It has frequently been decided that an ante-nuptial agreement by parol is not binding where it has merely been acted upon by marriage; in other words, that marriage is not to be regarded as a part performance of an agreement, and, as such, taking the case out of the statute (*u*). But acts of part performance independent of the marriage, such as the delivery of possession of the property in pursuance of the parol agreement, are sufficient to take the case out of the Statute of Frauds (*x*).

In *Lassence v. Tierney* (*y*), Lord Cottenham says, "If mar-

evidence in the cause, proof of any such contract; but when the authorities on this subject are attended to, it will be found that no such formal contract is required." Per Lord Cottenham, C., in *Hammersley v. De Biel*, 12 Cl. & Fin. p. 61, n.

(*q*) "I do not apprehend that the quantum of pecuniary benefit will affect the question; and I am surprised to find observations about the amount of the penalty, as varying the reciprocity where marriage is one of the considerations." Per Lord Eldon in *Prebble v. Boghurst*, 1 Swan. 319.

(*r*) Per Lord Redesdale, in *O'Gorman v. Comyn*, 2 Sch. & Lef. p. 147.

(*s*) *Montacute v. Maxwell*, 1 P. Wms. 618.

(*t*) *Ridgway v. Wharton*, 6 H. L. Cas. 193, 238; *Baumann v. James*, L. B., 3 Ch. 508; *Long v. Millar*,

4 C. P. D. 450; *Cave v. Hastings*, 7 Q. B. D. 125; *Shardlow v. Cotterell*, 18 Ch. D. 280; 20 Ch. D. 90. The 4th section of the Statute of Frauds, now under consideration, applies to five different contracts. Cases upon it arise most frequently upon contracts relative to the sale of real estates, as to which see Sugden, V. & P., Ch. IV.; Dart, V. & P., Ch. VI.

(*u*) See *Moorhouse v. Colvin*, 15 Beav. 341, 349.

(*x*) *Surcome v. Pinniger*, 3 D., M. & G. 571; *Ungley v. Ungley*, 5 Ch. D. 887.

(*y*) 1 M. & G. 551. See also *Surcome v. Pinniger*, 3 De G., M. & G. 571; *Warden v. Jones*, 23 Beav. 487; 2 De G. & J. 76; *Caton v. Caton*, L. R., 1 Ch. 137; L. B., 2 H. L. 127.

riage were a part performance, there would be an end of the statute; every parol contract followed by marriage would be binding.” Ch. IX. s. 2.

Should, however, anyone be induced to marry upon the faith of certain representations (although only parol), equity will relieve, and protect against fraud. Cases of fraud.

Thus, in *Hammersley v. De Biel* (z), Lord Lyndhurst, L. C., asserted it to be “a principle of law, at least of equity, that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them,—if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed and will give effect to the proposal” (a).

In a subsequent part of his judgment he said:—

Would not a Court of Equity enforce the execution of a settlement after marriage, in pursuance of proposals or contract entered into before marriage?

And Lord Campbell added, that “if *that* were not to be considered as the doctrine of a Court of Equity, the most monstrous frauds would be committed.”

Some fraudulent father (said his lordship) might hold out to the suitor of his daughter that he meant to make a settlement upon his daughter and her issue. The marriage would take place in the belief that that settlement would be made; and then after the marriage he might say, “This was only an intimation of my intention at the time. I have changed my mind, and I will not give her a shilling.” That would be most unjust; and to prevent such frauds this doctrine has been laid down, and, I think, has been most properly laid down, and ought to be acted upon (b).

The House of Lords in this case affirmed the decision of Lord Chancellor Cottenham, whose judgment in the Court of

(z) 12 Cl. & Fin. 45.

(a) See Lord Cranworth’s observations on this *dictum* in *Maunsell v. White*, 4 H. L. Cas. 1039, 1056; and Sugden’s Law of Property, p. 53.

(b) Lord Campbell here supposes throughout a case of fraud. But it will be observed that Lord Lyndhurst puts the thing more largely, so as apparently to embrace a case of mere verbal inducements held out to a suitor.

Ch. IX. s. 2. Chancery had confirmed upon appeal the decree of Lord Langdale. The case on that appeal is not reported; but a note of Lord Cottenham's observations in disposing of it, was printed for the use of the House of Lords, and admitted by the counsel on both sides to be correct (c). From that note is extracted the following passage which bears on the point now under consideration :—

Remarks
of Lord
Cottenham.

A representation made by one party, for the purpose of influencing the conduct of the other party, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation. Of this *Hodgson v. Hutchenson* (d), *Cookes v. Mascall* (e), and *Wankford v. Fotherley* (f), which last was affirmed by the House of Lords, afford strong instances. In *Luders v. Anstey* (g), a suggestion for consideration, followed by marriage, was held to be binding (h).

Satisfaction
of the statute
by subsequent
recognition ;

Perhaps the most important point which was considered to be decided in *Hammersley v. De Biel*, was that upon which Lord Langdale had proceeded in the original decree, namely, that marriage is no bar to the provisions of the 4th section of the Statute of Frauds respecting agreements in consideration of marriage being satisfied by *subsequent recognition*. This view appears to have been adopted by Lord Cottenham in the Court of Chancery, notwithstanding doubts more than once judicially

(c) 12 Cl. & Fin. at p. 61.

(d) 5 Vin. Ab. 522.

(e) 2 Vern. 200. The report of this case has the following marginal note: "Marriage agreement reduced into writing, though not signed by either party, yet decreed to be performed."

(f) 2 Vern. 322.

(g) 4 Ves. 501.

(h) See *Moore v. Hart*, 1 Vern. 201; 2 Rep. Ch. 284; *Halfpenny v. Ballet*, 2 Vern. 373; *Bird v. Blossie*, 2 Vent. 361; *Merry v. Ryves*, 1 Ed. 1; *Madox v. Nowlan*, Beatty, C. C. 632; *Maunsell v. White*, 1 Jo. & Lat. 539; 4 H. L. C. 1039; *Jorden v. Money* 5 H. L. C. 185; *Crofton v. Ormsby*, 2 Sch. & L. 583; *Bold v. Hutchinson*, 20 Beav. 250; 5 D.,

M. & G. 558; *Prole v. Soady*, L. R., 3 Ch. 220; *Cooper v. Wormald*, 27 Beav. 266; *Loxley v. Heath*, 27 Beav. 523; *Williams v. Williams*, 37 L. J., Ch. 854; *Coverdale v. Eastwood*, L. R., 15 Eq. 121; *Dashwood v. Jermyn*, 12 Ch. D. 776. See also *Denton v. Davies*, 18 Ves. 499; though this was a case where the representations had been made in writing. The dicta in *Hammersley v. De Biel* appear at first sight to sanction the general doctrine that a parol agreement in consideration of marriage is binding where it has been acted upon; but the remarks of their lordships throughout the case must be regarded as delivered on the assumption of the existence of an agreement in writing.

expressed upon the question, how far a written undertaking Ch. IX. s. 2. after marriage to perform a parol promise before marriage, could be enforced. In *Hammersley v. De Biel*, a parent on the marriage of his daughter entered, by the agency of his two sons, into an undertaking in writing, to leave his daughter by will 10,000*l.* Relying on this document, and as a part of the arrangement, the intended husband secured for the lady a provision of 500*l.* a-year, and the marriage thereupon was solemnized. After the marriage the father wrote a letter, duly signed by him, in which he referred to the prior document. The bill was filed by a son of the marriage against the parent's executor to compel payment of the 10,000*l.* out of his assets. From the following remarks of Lord Cottenham, it is apparent that he considered the requirements of the statute to have been satisfied no less by the agency of the two sons, than by the parent's subsequent recognition of their proceedings.

Assuming for the present that the two brothers of the intended wife were duly authorized by the father to enter into the arrangement with the intended husband, the document containing the proposed arrangement proves that both concurred in what that paper contains; for it is written partly by the one and partly by the other. Independently of this, however, there is the letter of the father, signed by himself, in which he, referring to this document, says, "The only question now is, I conceive, what the expression used in the engagement legally implies," by which he must be understood to mean that if the expression used amounted to an obligation to pay the 10,000*l.*, he was ready to perform it. I am aware that in *Randall v. Morgan* (i), Sir William Grant suggests a doubt whether a written promise after marriage to perform a parol agreement made before could be enforced; but in *Hodgson v. Hutchenon* (k), *Taylor v. Beech* (l), and *Mountacue v. Maxwell* (m), it was held that such a subsequent written promise would be binding within the statute. It was argued that the two brothers had no authority to enter into this arrangement. But what is conclusive on this point is the letter of the father himself, who, not disputing the authority under which the engagement was made, says, the whole question depends on its construction.

This post-nuptial recognition, however, must amount to a part performance of the parol agreement by some person other than the But by other than the party chargeable.

(i) 12 Ves. 67. See p. 73.

(l) 1 Ves. sen. 297.

(k) 5 Vin. Abr. 522.

(m) 1 Str. 236.

Ch. IX. s. 2. party to be charged therewith, in order to establish it. This is a test the imposition of which would not seem to be justified by the earlier cases (*n*) ; but in *Warden v. Jones* (*o*), Lord Chancellor Cranworth, referring to the decision in *Dundas v. Dutens* (*p*), that a post-nuptial settlement recited to be made in pursuance of an ante-nuptial parol agreement is good, said, "on that decision I will only remark, that, if it be a correct view of the law, the whole policy of the statute is defeated." And in *Caton v. Caton* (*q*) the same Lord Chancellor decided, that the ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, there it would be a fraud in the other party to set up the legal invalidity of the contract, on the faith of which he induced or allowed the person contracting with him to act.

The making a will in pursuance of an ante-nuptial parol agreement to do so is no part performance under the statute (*q*). This of course follows from the general principle.

How far
binding.

An ante-nuptial parol agreement recited in a post-nuptial settlement would be binding by estoppel on all persons claiming under the settlement (*r*). But as against creditors (who are not parties to the settlement), it cannot be maintained that such an agreement is a good consideration to support the settlement (*s*). "Such a doctrine," said Sir Thomas Plumer, "would give to every trader a power of excluding his creditors by a recital in a deed to which they are not parties" (*t*).

(*n*) See the cases cited in *Hammersley v. De Biel*, 12 Cl. & Fin. 45; and those cited *supra*, p. 208, n. (*h*); also *Spurgeon v. Collier*, 1 Ed. 54; *Barkworth v. Young*, 4 Dr. 1.

(*o*) 2 De G. & J. 76, 85.

(*p*) 1 Ves. jun. 196.

(*q*) L. R., 1 Ch. 137; *S. C.*, L. R., 2 H. L. 127. See *Stroughill v. Gulliver*, 27 L. T. 258.

(*r*) *Battersbee v. Farrington*, 1 Sw. 106, 113. See also *Marchioness of Annandale v. Harris*, 2 P. Wms.

432; *Lainson v. Tremere*, 1 A. & E. 792; *Carpenter v. Buller*, 8 M. & W. 209. But such a recital, if proved to be untrue, is not valid. *L'Estrange v. Robinson*, 1 Hog. 202; *Hogarth v. Phillips*, 4 Dr. 360.

(*s*) *Goldicutt v. Townsend*, 28 Beav. 445.

(*t*) *Battersbee v. Farrington*, 1 Sw. 106, 113. For the opinion of Lord St. Leonards on this subject, see Sugd. on Powers, pp. 649, 650, 8th ed.

Where a man so far carried out his parol promise as to actually transfer the subject-matter of the promise before marriage, his post-nuptial settlement was held good against creditors (u). Ch. IX. s. 2.
Where parol agreement acted upon before marriage.

If the ante-nuptial parol agreement is incomplete, there cannot be a part performance, any more than in cases unconnected with marriage (x). Where parol agreement incomplete.

SECTION III.

THE AGREEMENT BINDING ON ONE SIDE THOUGH NOT PERFORMED ON THE OTHER.

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There is this difference between agreements in consideration of marriage and all other agreements, namely, that where the agreement is in consideration of marriage, a breach of obligations by one party is not a sufficient excuse for non-performance by the other; and the reason is, that a contract in consideration of marriage is made not merely on behalf of the parties to the contract, but also on behalf of the issue that may spring from the marriage (y). The children are, in fact, regarded as *purchasers* (z). Marriage agreements different from all others.

Rights of issue.

(u) *Cooper v. Wormald*, 27 Beav. 266. See *Brown v. Jones*, 1 Atk. 188; *Stone v. Stone*, L. R., 5 Ch. 74.

(x) *Thynne v. Glengall*, 2 H. L. C. 131; *Spurgeon v. Collier*, 1 Ed. 54.

(y) It must be observed, however, that as against the defaulting party, his non-performance would be a good

defence. For, as Lord Redesdale says, in *Crofton v. Ormsby*, 2 Sch. & Lef. 602, "Where the performance is sought by the defaulting party, he cannot enforce it against the person injured by his default."

(z) *Cole v. Bateman*, 1 P. Wms. 141, 145; *Seale v. Seale*, 1 P. Wms. 290; *Nairn v. Prowse*, 6 Ves. 752.

Ch. IX. s. 3.

Thus, in *Pyke v. Pyke* (g), upon an ante-nuptial agreement by a husband to settle lands on his wife, it being stipulated that her fortune should remain in the hands of trustees till such settlement should be made, the husband dying insolvent without performing his covenant, the wife's fortune was held to have survived to her for her own benefit, and the issue were declared not entitled to claim it from her.

Who may
enforce mar-
riage con-
tracts.

It is a well-established rule that an incomplete contract or agreement will only be enforced at the suit of purchasers for valuable consideration. But in the case of marriage contracts, the consideration, which has always been held valuable, extends to the parties and the issue of the marriage (h); for the latter, although not strictly speaking *purchasers*, yet are presumed from the nature of the case to be in the contemplation of the parties when making the contract (i).

"They are said to be within the marriage consideration, that is to say, are so clearly within the objects of the settlement that it would be wrong and injurious to the interest of society not to allow them to enforce it" (k). In the following passage, Lord Justice Cotton seems to confirm this view as to the position of the children :—

"As a rule, the Court will not enforce a contract, as distinguished from a trust, at the instance of persons not parties to the contract. (*Colyear v. Countess of Mulgrave* (l).) The Court would *probably* enforce a contract in a marriage settlement at the instance of the children of the marriage, but this is an exception from the general rule in favour of those who are specially the objects of the settlement" (m).

A further exception has been engrafted on the general rule in favour of the children of the intended wife by a former marriage (n), and also in favour of her illegitimate children (o); but

(g) 1 Ves. sen. 376.

(h) *Nairn v. Prowse*, 6 Ves. 752; Sug. V. & P. 716, 14th ed.

(i) *Gale v. Gale*, 6 Ch. D. 144.

(k) Per Fry, J., in *Gale v. Gale*, *ubi supra*, at p. 148.

(l) 2 Keen, 81.

(m) *Re D'Angibau*, 15 Ch. Div. 228, at p. 242.

(n) *Newstead v. Searles*, 1 Atk. 265; *Chapman v. Emery*, Cowp. 278; *Gale v. Gale*, *ubi supra*.

(o) *Clarke v. Wright*, 6 H. & N. 849.

it seems that the same reasoning does not apply to the previous children of the husband (*p*). Ch. IX. s. 3.

The foregoing observations apply only to those cases where a covenant has to be enforced, or the aid of the Court invoked to carry out some incomplete settlement or agreement. If a settlement has been executed, or a complete voluntary assignment as distinguished from an executory agreement, or a complete voluntary trust as distinguished from a voluntary contract to create a trust, has been made, a volunteer as well as a purchaser is entitled actively to assert his equity (*q*).

Distinction between cases of executed and executory settlement or agreement.

The next of kin (*r*), collateral relatives (*s*), and children of a future marriage (*t*) have been held to be volunteers; but where the voluntary trust is executed, either by a completed settlement or declaration of trust, they become *cestuis que trust*, and the settlement, in accordance with the principle just stated, cannot be revoked (*u*).

The question also, Who can enforce a contract to create a trust? is very different from that which will be considered hereafter, namely, whether a limitation to collaterals in a marriage settlement of real estate is void as against a subsequent purchaser for value under the statute 27 Eliz. c. 4 (*x*).

If specific performance of marriage articles is decreed at the suit of a person within the consideration of the marriage, it will be decreed as to the articles in their entirety, so as to include limitations to collaterals (*y*).

(*p*) *Price v. Jenkins*, 4 Ch. D. 483. Reversed on another ground, 5 Ch. D. 619. See, however, *Osgood v. Strode*, 2 P. Wms. 245; *Ithell v. Beane*, 1 Ves. sen. 205.

(*q*) See notes to *Ellison v. Ellison*, White & Tudor's Leading Cases, vol. i. p. 297.

(*r*) *Heatley v. Thomas*, 15 Ves. 596; *Savill v. Savill*, 2 Coll. 721; *Paul v. Paul*, 19 Ch. D. 47; 20 Ch. D. 742.

(*s*) *Johnson v. Legard*, 3 Mad. 283;

Smith v. Cherrill, L. R., 4 Eq. 390. See *Kekewich v. Manning*, 1 D., M. & G. 176.

(*t*) *Wollaston v. Tribe*, L. R., 9 Eq. 44. See, however, *Clayton v. Lord Wilton*, 3 Mad. 302 (n.).

(*u*) *Paul v. Paul*, *ubi supra*, overruling the same case, 15 Ch. D. 580.

(*x*) See *Re D'Angibau*, 15 Ch. D. 228, 242.

(*y*) *Nash v. Goring*, 3 Atk. 186, 190; *Davenport v. Bishopp*, 1 Ph. 698.

See also *Re D'Angibau*, *ubi supra*.

SECTION IV.

OF THE TERMS OF ANTE-NUPTIAL AGREEMENTS.

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Ch. IX. s. 4.

*Randall v.
Morgan.*

Agreements in consideration of marriage, in order to be binding, must be positive and unqualified. Thus, in *Randall v. Morgan* (z), it appeared that previously to the marriage of Phillip Godfrey with Mary Crooke, her father wrote to him as follows :—

“You have already my sentiments in the letter I wrote you from St. Kitts; and nothing has arisen since that period to induce me to alter my opinion. The addition of 1,000*l.*, 3 per cents. stocks, is not sufficient to induce me to enter into a deed of settlement. Whether Mary remains single or marries, I shall allow her the interest of 2,000*l.*, at 4 per cent. If the latter, I may bind myself to do it, and pay the principal at my decease to her and her heirs.”

The marriage took place; and soon after it the father wrote a letter to his daughter, which contained the following passage :—

“Mr. Godfrey may draw immediately for 40*l.*, the half-year’s interest due on my bond for 2,000*l.*, which became due on the first of this month.”

The father had, in fact, promised to execute a bond for the 2,000*l.*, but it did not appear that he ever did execute it.

Sir William Grant disposed of the case in his usual brief and masterly way,—simply saying,—

“The father professes indeed a resolution—a determination on which he means to act; but it is one which he keeps in his own power, the execution of which is to depend entirely upon himself. If the other construction should prevail, he would be making a settlement in the most disadvantageous way on his side, without stipulating for any settlement by the husband; though just before he had declared that the settlement offered by the husband was insufficient to induce him to make any settlement. This letter, therefore, is no agreement.”

In a case (a) before Lord Chancellor Sugden, the suitor of a young lady in Ireland communicated to her guardians a letter from his uncle, who stood *in loco parentis* to him, stating that he had by his will left one of his estates, which he mentioned, to his nephew. The guardians, however, resolved that, until a suitable settlement of real estate should be made by the uncle, the marriage should not take place. This resolution being reported to the uncle, he addressed his nephew in these terms:—

“MY DEAR ROBERT,

“My sentiments respecting you continue unalterable. However, I shall never settle any part of my property out of my power, so long as I exist. My will has been made for some time; and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made. Be assured that nothing could give me more pleasure than to hear of your union with the object of your fondest wishes; and I should be concerned that the resolution I have made should retard your happiness. However, I hope you will give me credit in believing that I am only actuated by the motive I have before mentioned, that of avoiding all jealousy that the rest of my family might feel had I complied with the wishes of the young lady's guardians. I will thank you to communicate the subject of this letter in answer to one I have received from them. In all matters of this sort everything should be carried on in the most candid and explicit manner.”

Upon the strength of this assurance, such as it was, the marriage was had, but the uncle failed to make good the purpose which he in this qualified way expressed. Sir Edward Sugden held that the letter did not amount to an agreement; and that, even supposing it amounted to an agreement, the words “unless some unforeseen occurrence should take place,” left it open to the writer to dispose of the property as he pleased (b).

The agreement must also be consistent, intelligible (c) and definite (d). Terms must be definite;

(a) *Maunsell v. White*, 1 Jo. & Lat. 539; 4 H. L. C. 1039.

(c) *Franks v. Martin*, 1 Ed. 309.

(d) *Kay v. Crook*, 3 Jur., N. S.

(b) See also *Madox v. Nowlan*, 104. Beat. Ca. Ir. Cha. 632.

Ch. IX. s. 4.

but need not
be technical.

*Saunders v.
Cramer.*

It is not, however, necessary that the terms of an agreement in consideration of marriage should be such as a professional person would use in preparing a legal instrument. In *Luders v. Anstey* (e), words of mere "proposal" were held binding when immediately followed by marriage. And in *Saunders v. Cramer* (f), expressions which scarcely seem to import more than *intention*, received a similar construction, having also been relied upon and acted upon. The case was as follows:—

On the marriage of a young lady, her grandmother, who was not under any legal or moral obligation to provide for her, signed the following memorandum, which had been written by her agent at her request, viz.—“Lady T. has desired C. (the agent) to notify that she intends leaving E. (the young lady in question) 2,000*l.*, to bear interest from her death, and to be secured by a bond. She has further desired C. to say that this is the provision she intends making for E. on her intended marriage.” On the same day C. wrote to the intended husband, S., stating that Lady T. intended to give 2,000*l.* at her death, and a house at Cheltenham. Subsequently C. wrote to Lady T., stating that S. wished to have the bond perfected, and also to have the house which Lady T. intended to give. This letter was read to Lady T. by E., and she then desired E. to keep it, adding that it related to the business with S. The marriage was shortly afterwards solemnized in the lifetime of Lady T., who, however, died without having executed the bond, or conveyed the house. Lord Chancellor Sugden held that her representatives were bound (g).

Circumstances
may constitute
expression of
intention a
contract.

The circumstances under which a representation is made, may convert into a binding contract what would otherwise be merely an expression of intention. Thus, in a recent case (h), a father on the marriage of his only child excused himself from making an immediate settlement upon her, on the ground that his capital was embarked in a large cotton business, and in a farm; and expressed an intention at the same time “in the event of the marriage taking place” of settling his property by will on his daughter “absolutely and independently of her husband, or, in other words, in strict settlement.” It was held, that these expressions of intention amounted to a contract on the part of the father to settle the whole of the property of which

(e) 4 Ves. 501.

(f) 3 Dru. & War. 87.

(g) See also *Montgomery v. Reilly*,

1 Dow. & Cl. 62.

(h) *Coverdale v. Eastwood*, L. R.,

15 Eq. 121.

he should die seised or possessed upon his daughter in strict settlement. Ch. IX. s. 4.

Bacon, V.-C., observed in the course of his judgment (i)—

I must say, in my opinion, if any words can be said to express a clear meaning and intention—a positive undertaking and contract—these words are sufficient for that purpose, because these words are used at a time when a marriage is impending, a marriage to which the father has given his consent, which did take place shortly afterwards, and which, as cannot for a moment be disputed, did take place in consideration, among other things, of the promise which had been made by the father to settle his property in strict settlement upon the plaintiff and her children.

The decision, however, in this case can be equally well supported, on the general principle that where one person makes a representation to another, in consequence of which that other person contracts engagements, or alters his position, or is induced to do any other act which either is permitted by or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively (k).

If the representation and the marriage, or other engagement contracted by the person to whom such representation is made, do not form one transaction, no obligation which can be enforced is incurred by the person making the representation, which, in such a case, is merely *nudum pactum* (l).

(i) Page 130.

L. C. 185, 210.

(k) Per Bacon, V.-C., L. R., 15 Eq. 131; see *Jordan v. Money*, 5 H.

(l) *Dashwood v. Jermyn*, 12 Ch. D. 776.

SECTION V.

OF THE CONSTRUCTION OF ANTE-NUPTIAL AGREEMENTS.

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Ch. IX. s. 5.

Importance of the marriage consideration.

Of all legal considerations marriage is the gravest, because it involves an irrevocable change of personal status. There can be no *restitutio in integrum*.

Agreements construed liberally.

Case of a bond extinguished at law.

It has been repeatedly said by the judges, that the consideration of marriage is not to be weighed in pecuniary scales (*m*). The construction, therefore, of agreements, in consideration of marriage, is large and liberal; not technical or refined. Of this a remarkable and early instance is furnished by the case of *Acton v. Peirce* (*n*) before Lord Keeper Wright. There the intended husband gave the intended wife a bond, conditioned to leave her 1,000*l*. if she should survive him. The marriage thereupon took place; what, then, became of the bond? At law it was void; because at law the marriage operated as a release and extinguishment of it. But the Lord Keeper held that it might, nevertheless, subsist as an agreement in equity, and he decreed accordingly. This precedent has always been followed (*o*).

(*m*) "There is a consideration, and the most valuable of all considerations, namely, the intended marriage." *Per* Lord Chancellor Sugden, in *Saunders v. Cramer*, 3 Dru. & War. 87. See also *Prebble v. Boghurst*, 1 Swan. 309, 318; *Campion v. Cotton*, 17 Ves. 263, where the efficacy of the marriage consideration was established in favour of a

wife, although she knew of the husband's insolvency at the time, and the case was in other respects suspicious.

(*n*) 2 Vern. 480. There is an even earlier authority for this doctrine in the case of *Drake v. Storr*, Freem. Ch. 205.

(*o*) "When a bond is executed in contemplation of marriage, there is

In *Prebble v. Boghurst* (p), John Prebble, by a bond executed in contemplation of his marriage with Mary Townsend, bound himself, his heirs, executors, and administrators, to Hans Sloane and John Tilden, their executors, administrators, and assigns, in the penal sum of 2,000*l.*; the condition of the bond (upon which the whole question turned) being to the following effect:—

Ch. IX. s. 5.
Case of a bond not extinguished at law.

To be void, if John Prebble should at any time during his natural life, become seised of any messuages, &c. in possession, and should settle the same upon the said Mary Townsend, and the issue of the said intended marriage, the better to make a provision for the said Mary Townsend in case she should happen to survive him.

This bond, not being to the intended wife, like that in *Acton v. Peirce*, was not released or extinguished by the marriage—which took place on the faith of it. During this marriage, John Prebble did not become seised of any real estate. He survived his wife and married again. During his second marriage he became seised of real estates amounting in value to 70,000*l.* At his death he left issue by both marriages. The question was, whether all those real estates were subject to the condition of the bond? A bill claiming the whole, exclusively, was filed by the children of the first marriage. The case being opened, Lord Eldon, recognizing the principle that a marriage bond was an agreement in equity, said,

This agreement having been distinctly entered into, and on the consideration of marriage, is such as, when its meaning is once ascertained, a Court of Equity will enforce. If there has been a breach of the bond at law, the plaintiffs are entitled to relief in equity. But they have no title in equity if there has been no breach at law. The principal question, therefore, is, whether the omission to settle the estates is a breach of the condition of the bond. On that question it will be proper to have the opinion of a Court of Law.

A case was accordingly directed to the Court of Common Pleas, who certified that no breach had been committed. But Lord Eldon was not satisfied;—and he called for the aid of the Lord Chief Baron Richards, and Mr. Justice Abbott (afterwards

no doubt that it constitutes an agreement which Courts of Equity will perform." *Per* Lord Eldon, *Prebble v. Boghurst*, 1 Swan. 318. See *Watkyns v. Watkyns*, 2 Atk. 97; *Gage v. Acton*, 1 Salk. 325. (p) 1 Swan. 309.

Ch. IX. s. 5. Lord Tenterden) to have the case solemnly considered in the Court of Chancery. Lord Eldon disclosed his own views to these learned judges in the following terms :—

It strikes me that the argument in the Common Pleas did not unfold all the difficulties of the case. The bond, with this condition, was executed in contemplation of marriage, and there is no doubt that it constitutes an agreement which Courts of Equity will perform. It was not on that question that I desired the opinion of a Court of Law, nor of the judges who now assist me, but on this, whether there has been a breach of the condition in the bond—a question on which this Court is competent to declare an opinion, but which must be dealt with in the same way in equity as at law, and which, therefore, I took the liberty of sending to a Court of Law. The obligor on the marriage was to become entitled to 200*l.* absolutely, and, also, to a share of the personal estate of his wife's father after the death of her mother (*p*). What was his interest during the coverture in this part of the property does not appear; and it is unnecessary to state here what he could, or could not, have done with it. A part of the consideration, besides the pecuniary benefits, is marriage. I do not apprehend that the quantum of pecuniary benefit will affect the question, and I am surprised to find observations about the amount of the penalty as varying the reciprocity, when marriage is one of the considerations. An obligation to make a settlement on the wife and the issue will include an obligation to make a settlement on the issue after the death of the wife. The question for the opinion of the learned judges is, whether the obligor on the death of the first wife, having married, and then, and not before, become seised of real estates, and having died without making a settlement of those estates in favour of the issue of the first marriage, has committed a breach of the condition?

The two learned judges, after copious argument and mature deliberation, delivered their opinion in opposition to the certificate of the Court of Common Pleas. They held that a breach had been committed; so that in this discordance of high authorities, Lord Eldon (as was his custom) adhered to his original impression. In finally disposing of the case, he observed,—

Marriage bonds being considered in this Court as agreements, the case has been represented as a case of hardship, the issue of the first marriage claiming all the lands of which the obligor became seised during the second coverture as subject to the obligation, or, to give it another name, the agreement. But unless hardship arise to a degree of inconvenience and absurdity that the Court can say such could not be the meaning of the parties, it cannot influence the decision. My opinion is that the

(*p*) This appeared from the recitals in the bond.

bond affects all the lands of which the obligor was seised during his life. And I think that, the wife not having survived the husband, the conveyance must be made to the children of the first marriage, as tenants in common in fee (*q*). Ch. IX. s. 5.

Here, therefore, was a bond valid at law as well as in equity : and subject to the same construction in each jurisdiction. But how widely different the relief afforded ! At law nothing could have been recovered beyond the penalty in the bond—2,000*l*. Whereas equity decreed the conveyance of estates valued at no less than 70,000*l*. ; and this upon the great principle of specific performance, which gives, as Sir William Grant says (*r*), “*the very thing*” contracted for, instead of damages for a breach (*s*). Difference of relief at law and in equity.

When agreements in consideration of marriage are meant to become the groundwork of settlements, they are called “marriage articles.” They are often drawn up hastily, and signed on the eve of the nuptial ceremony from want of time to prepare a final deed ; which, however, when ultimately executed, if it be in strict conformity with the articles, will supersede them. When the deed is not in harmony with the articles, the Court, as we shall see hereafter, will reform it, so as to make it conformable to the agreement of the parties. Marriage articles.

(*q*) See on this subject *Rippon v. Dawding*, 1 Ambl. 565 ; *Estcourt v. Estcourt*, 1 Cox, 20 ; *Cannel v. Buckle*, 2 P. Wms. 243 ; *Logan v. Wienholt*, 1 Cl. & Fin. 611 ; 7 Bli. N. C. 1 ; *Chilliner v. Chilliner*, 2 Ves. sen. 527 ; *Campion v. Cotton*, 17 Ves. 263 ; *Douglas v. Wood*, 1 Cha. Ca. 99 ; *Watson v. Roulledge*, Cowper, 705.

(*r*) *Bozen v. Farlow*, 1 Mer. at p. 472.

(*s*) Actions of damages for breach of contract are, in some shape or other, common to the law of all civilized nations. But bills for specific

performance seem peculiar to the law of this country. It does not appear that anything of the kind was known to the civilians. Specific performance, therefore, is one of our very few indigenous plants. It has perhaps consequently been cultivated with more than ordinary assiduity ; and under the care of a succession of great judges has become not only the most interesting, but, upon the whole, the most useful and important branch of equity jurisprudence. (See the remarks of Lord Hardwicke, in *Penn v. Lord Baltimore*, 1 Ves. sen. 446.)

SECTION VI.

ANTE-NUPTIAL AGREEMENTS BY INFANTS (*t*).

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Ch. IX. s. 6.

Where both parties are minors.

Where both parties are minors, it would seem that no agree-

(*t*) "Miserable must the condition of minors be, excluded from the society and converse of the world, deprived of necessities, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their imprudence, enables them to do binding acts for their own benefit, and without prejudice to themselves, for the benefit of others. To mention a rule or two,—If an infant does a

right act, which he ought to do, which he was compellable to do, it shall bind him; as if he makes equal partition, if he pays rent, if he admit a copyholder upon a surrender. A right and lawful act is not within the reason of the privilege which is given to protect infants from wrong. His being compellable to do it, proves the act to be substantially what he ought to do. To what end should the law permit a minor to avoid an act which he might be compelled to do over again after it was undone? This would be assisting him to vex and injure others, without the least benefit to

ment in consideration of marriage can bind them (u). It was formerly thought that the concurrence of guardians might render binding the acts of infants (x). But this is no longer law (y). And before the Infants' Settlement Act (z) even the sanction of the Court of Chancery could not cure their disability (a). But

Chap. IX. s. 6.

Concurrence
of guardians.
Sanction of
the court.

himself. Another rule is, 'that the acts of an infant which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding;' as when an infant patron presents; when an infant executor duly receives, and acquits, pays and administers the assets; when an infant head of a corporation joins in corporate acts; or when an infant officer does the duties of an office which he may hold. A third rule, deducible from the nature of the privilege (which is given as a shield, and not as a sword), is, 'that it shall never be turned into an offensive weapon of fraud or injustice;' as where a tenant for life and an infant in remainder levied a fine; the infant reversed the fine as to himself for the inheritance, for nonage, yet he was bound by his assent to the fine and joining in it, not to enter for the forfeiture."—Per Lord Mansfield, in *Zouch v. Parsons*, 3 Burr. 17, 94; 1 Black. Rep. 575. In the same case, his lordship distinguishes between the deeds of infants and those of married women, observing that "an infant, or they who stand in his place, cannot plead *non est factum*, and give the infancy in evidence; but they must plead the infancy specially to avoid the deed. The deed of a *feme covert* has the form of a deed, but she may plead *non est factum*. The distinction between deeds of *femes covert* and infants is important. The first are void, the second voidable."—See

now, as to married women, 45 & 46 Vict. c. 75; and as to infants, 37 & 38 Vict. c. 62.

(u) "Where both the intended husband and wife are minors, the articles are absolutely null, and create no obstacle to the marrying parties, so soon as they become adult, selling or disposing of the estates." Jarman's Conveyancing, vol. 9, p. 35 (edit. 1833).

(x) See *Harvey v. Ashley*, 3 Atk. 607; *Ainslie v. Medlycott*, 9 Ves. 13, 19.

(y) Per Lord Thurlow: "I cannot conceive that the parents' or guardians' consent can make any essential difference in the contract." *Durnford v. Lane*, 1 Bro. C. C. 106, p. 111. See *Simson v. Jones*, 2 R. & M. 365; *Field v. Moore*, 7 De G., M. & G. 691.

(z) 18 & 19 Vict. c. 43: "An Act to enable infants, with the approbation of the Court of Chancery, to make binding settlements of their real and personal estate on marriage."

(a) *Simson v. Jones*, and *Field v. Moore*, *ubi sup.* Compare *Earl of Buckinghamshire v. Drury*, 2 Ed. 60. Where, however, a ward is married without the approbation of the Court, not only will the husband be compelled to make a proper settlement, but the Court will tie up the property of the ward. This jurisdiction, by the exercise of which the capital is sequestered in favour of unborn children, and the owner is deprived of the power of giving

Chap. IX. s. 6. where the contract was between an infant on the one side and an adult on the other, the adult might have been bound, although the infant was not. Thus, to put the simplest case, let us suppose that before the marriage of a female infant and a male adult, certain articles were entered into, whereby it was agreed to settle the wife's chattels personal in possession. These, as we have seen (*b*), would formerly, but for the agreement, have passed to the husband as his absolute property, by virtue of the marriage. The agreement, therefore, to settle them was considered to be, not the agreement of the wife, but that of the husband, and he alone required to be bound.

Infant on one side and adult on the other.
Case of female infant: her chattels personal in possession.

Alteration by Act of 1882. These considerations no longer apply where the marriage took place on or after the 1st January, 1883: for, by virtue of the Married Women's Property Act, 1882, which came into operation on that day, the wife retains all her real and personal property, and the husband takes no interest therein during the coverture. Accordingly the adult husband has no more power to bind the property of his infant wife, than the adult wife formerly had to bind that of her infant husband. In the former editions of this work, the subject of ante-nuptial agreements by infants received a very full discussion (*c*). Its importance, however, is now considerably diminished; and, accordingly, only an outline of the former law is now offered to the reader.

Husband no power to bind infant wife's property.

Formerly wife's chattels bound,

but not choses in action if not reduced into possession.

The infant wife's chattels personal in possession were, as we have seen, absolutely bound by the husband's settlement, and the doctrine has been extended to her chattels real, so as to exclude her right by survivorship (*d*). But, somewhat inconsistently, her right to her choses in action by survivorship was held not to be excluded by such a settlement, where they had not been reduced into possession during the coverture (*e*).

Real estate. And where the property consisted of real estate, the agreement

even a life interest to her husband, is pronounced by Mr. Hayes to be "arbitrary, unjust and impolitic." Conveyancing, vol. 1, p. 560, 5th ed.

(*b*) *Ante*, p. 17.

(*c*) See 1st ed. 247—257; 2nd ed. 253—266.

(*d*) *Trollope v. Linton*, 1 Sim. & St. 477.

(*e*) *Ellison v. Elwin*, 13 Sim. 309; *Le Vasseur v. Scrutton*, 14 Sim. 116; *Cunningham v. Antrobus*, 16 Sim. 436; *Borton v. Borton*, *ibid.* 552; *Rawlins v. Birkett*, 25 L. J., Ch. 837.

bound neither the wife nor her heirs (*f*). The settlement, however, was binding on the adult husband, who, accordingly, was not allowed to aid the wife in any attempt to defeat the uses of the articles (*g*). Chap. IX. s. 6.
Adult husband bound.

A *covenant* on the part of the husband to settle the after-acquired property of the wife bound him, so far as he was able, to carry it into effect, but did not compel him "to cajole or coerce his wife into conveying her separate property to the uses of the settlement" (*h*). And an *agreement* by the husband and wife in an ante-nuptial settlement for the settlement of the wife's after-acquired property, has been held to be a covenant by the wife as well as by the husband, whether the wife is a minor or of full age (*i*); but where the agreement was so expressed as to relate only to acts to be done by the husband, it was decided that the wife was not bound to bring into settlement property given to her separate use (*k*). Covenant to settle after-acquired property.

The provision as to settling after-acquired property has in recent times generally assumed the form of an agreement by all parties: and such an agreement operates as a covenant by each party in respect of the acts to be done by him or her. The agreement is, in fact, read distributively, and not so as to impose obligations where there is no power of fulfilling them. Thus, in the case last referred to, the husband was decided not to have incurred any obligation in respect of the after-acquired separate

(*f*) *Pearson v. Pearson*, and *May v. Hook*, cited in *Durnford v. Lane*, 1 Bro. C. C. 113, n.; *Clough v. Clough*, 3 Wooddes. 453, n.; *Milner v. Lord Harewood*, 18 Ves. 259, 275; *Pimm v. Insall*, 7 Hare, 193; 1 M. & G. 449.

(*g*) *Durnford v. Lane*, 1 Bro. C. C. 106; *Ex parte Blake*, 16 Beav. 463.

(*h*) Per Jessel, M. R., in *Dawes v. Tredwell*, 18 Ch. Div. 354, 360. See also *Re Waring*, 21 L. J., Ch. 784; *Ramsden v. Smith*, 2 Drew. 298.

(*i*) *Smith v. Lucas*, 18 Ch. D. 531. This covenant by the infant

wife is of course voidable, and is binding upon her only by virtue of the doctrine of election; and as to the question whether this subject is affected by the Infants' Relief Act, 1874, see *post*, p. 230.

(*k*) *Dawes v. Tredwell*, 18 Ch. D. 354. See also *Re Waring*, 21 L. J., Ch. 784. When the intended wife is adult, her covenant includes property subsequently given to her "for her separate use independently of any husband." *Re Allnutt*, 22 Ch. D. 275, not following *Re Mainwaring's Settlement*, L. R., 2 Eq. 487. And see *Scholfield v. Spooner*, 26 Ch. D. 94.

Chap. IX. s. 6. property of his wife; and this decision governs all acquisitions of property which fall within the provisions of the recent Act.

Confirmation. In cases where the property of the infant wife was not originally bound by the settlement, she might have confirmed it after the death of her husband if of full age (*l*). And she might, after attaining twenty-one, and during the coverture, have elected whether the covenant should be binding on her separate estate or not; but in so electing she bound only that separate property to which she was entitled at the date of the confirmation, and not that to which she might subsequently become entitled during the coverture (*m*).

Election. The settlement of an infant's property may also become binding on her upon the principle of election, whereby if she accepts benefits under the settlement she cannot withdraw her own property from its operation (*n*). But, as prior to the Act of 1882, a married woman had no power to contract except in respect of her separate property in existence at the date of such contract (*o*), a married woman could not elect so as to bind her after-acquired separate property (*p*); or property in respect of which she was restrained from anticipation (*q*).

The next of kin (*r*) and the heir-at-law (*s*) of the wife are,

(*l*) *Ashton v. M'Dougall*, 5 Beav. 56; *Davies v. Davies*, L. R., 9 Eq. 468. As to what amounts to a confirmation of the settlement, see *White v. Cox*, 2 Ch. D. 387.

(*m*) *Smith v. Lucas*, 18 Ch. D. 531. See also *Wilder v. Pigott*, 22 Ch. D. 263, where it seems to have been decided that the wife could elect during her coverture to confirm the settlement so as to bind a contingent reversionary interest in personalty not given to her separate use, a proposition which must be accepted with some reserve; since the learned judge who decided the case professed to follow *Smith v. Lucas*, where the distinction is clearly maintained between a confirmation of the settlement gene-

rally, and a confirmation as regards particular property.

(*n*) *Barrow v. Barrow*, 4 K. & J. 409; *Willoughby v. Middleton*, 2 J. & H. 344; *Brown v. Brown*, L. R., 2 Eq. 481.

(*o*) *Pike v. Fitzgibbon*, 17 Ch. D. 454.

(*p*) *Smith v. Lucas*, 18 Ch. D. 531.

(*q*) *Ibid.*; *Willoughby v. Middleton*, *ubi supra*, being questioned on this point. See also the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 39, under which the Court has power to remove the restraint on anticipation if it be for the benefit of a married woman.

(*r*) *Savill v. Savill*, 2 Coll. 721.

(*s*) *Brown v. Brown*, L. R., 2 Eq. 481.

equally with the wife herself, bound to elect whether they will take under or against the settlement. Chap. IX. s. 6.

In a case where the wife had become of unsound mind, it was held that the court would, when it appeared to be for her benefit, make an election on her behalf (*t*).

A female infant who has no property of her own to settle may contract for the preparation of a settlement, which is in such a case considered a necessary: and is liable to pay for the costs of it; but it seems doubtful whether its provisions would bind her (*u*). Female infant may contract for preparation of settlement.

A female infant may be barred of dower by a jointure made by a settlement before marriage (*x*); but such provision for her must not be precarious (*y*). The old law, however, on this point has become unimportant since the 3 & 4 Will. 4, c. 105, by which women (including infants) married after the 1st January, 1834, may be barred of dower, as mentioned in the Act. Infant may accept jointure in bar of dower.

Where the intended husband is an infant, he is entirely disabled from entering into any valid contract for the settlement of his property (*z*), and his wife, taking no interest in such property during the coverture, is of course unable to bind him by her contract. The infant husband, however, is competent to assent to a settlement by the wife of her real estate, so as to exclude any imputation of fraud on his marital right (*a*); and in such a case he was bound to give effect to the settlement, not because he had contracted to do so, but because his marital right was effectually excluded by the ante-nuptial settlement. Infant husband not bound by settlement.

In *Nelson v. Stocker* (*b*), a male infant previously to his marriage with a woman possessed of personal property, executed a settlement by which he covenanted to pay 1,000*l.* to the trustee; subsequently he received the wife's personal estate, and after her Nelson v. Stocker.

(*t*) *Wilder v. Pigott*, 22 Ch. D. 263.

(*u*) *Helps v. Clayton*, 17 C. B., N. S. 553.

(*x*) *Drury v. Drury*, 2 Ed. 38.

(*y*) *Caruthers v. Caruthers*, 4 Bro. C. C. 500; and see *Corbet v. Corbet*, 1 S. & S. 612; *S. C.*, 5 Russ. 254.

(*z*) *Honywood v. Honywood*, 20 Beav. 451; *Derbshire v. Home*, 5 De G. & Sm. 702; 3 D., M. & G. 80.

(*a*) *Slocombe v. Glubb*, 2 Bro. C. C. 545.

(*b*) 4 De G. & J. 458.

Chap. IX. s. 6. death refused to pay the 1,000*l.*: it was held by the Lords Justices (Knight Bruce and Turner), reversing the decision of the Court below, that as the wife was not deceived by his misrepresentations as to his age, the settlement was not binding upon him.

Husband may
be put to his
election.

A male infant, however, might as well as a female have been put to his election between benefits conferred upon him by the settlement, and the disposition thereby made of his own property; and if the election had to be made during infancy, the Court decided for the infant what election ought to be made (*b*). The Court generally directed an inquiry as to what would be most for the infant's benefit (*c*); but in a clear case the election might be declared without a reference (*d*).

Infants' Relief
Act, 1874.

An infant's contract was formerly voidable and not void, and was capable of effectual ratification under Lord Tenterden's Act (*e*), after the infant attained the age of twenty-one, by writing under his hand. But by the Infants' Relief Act, 1874 (*f*), which has been held to be retrospective (*g*), it is enacted that—

“No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.”

This enactment supersedes the corresponding section of Lord Tenterden's Act; and, if the words “any promise or contract” are taken in their widest sense, and are not restricted by what may be conceived to be the object of the statute, it seems to render a valid ratification of an infant's settlement impossible (*h*); for, although a ratification when of full age would probably be equivalent to the execution of a new instrument, yet it would derive from the invalid ante-nuptial

(*b*) *Simson v. Jones*, 2 R. & M. 2 Ves. jun. 693.
365, 374.

(*c*) *Brown v. Brown*, L. R., 2 Eq.
481; *Bennett v. Holdsworth*, 6 Ch.
D. 671.

(*d*) *Blunt v. Lack*, 26 L. J., Ch.
148; *Lamb v. Lamb*, 5 W. R. 720,
772; and see *Wilson v. Townshend*,

(*e*) 9 Geo. 4, c. 14, s. 5.

(*f*) 37 & 38 Vict. c. 62.

(*g*) *Ex parte Kibble*, L. R., 10 Ch.
373.

(*h*) See *Trowell v. Shenton*, 8 Ch.
D. 318.

settlement no valuable consideration, and would accordingly be void as against subsequent purchasers for value. Chap. IX. s. 6.

Previously to the passing of the 18 & 19 Vict. c. 43, the Court declined to sanction the marriage of an infant ward, as he could not by reason of infancy make a binding settlement of his real estate (i).

If the infant is a ward of Court the sanction of the Court must be obtained to its marriage, and such sanction will not be granted unless it appears both that the marriage is suitable and that the proposed settlement is proper (k). Settlements where infants are wards of Court.

Where the ward married immediately after attaining twenty-one, and the fund in Court was small, it was directed to be paid out to her and was not settled (l).

Where a female ward marries without the sanction of the Court the husband is excluded from all interest under the settlement (m).

The powers of the Court over the property of the ward will continue after she has attained twenty-one (n).

By the Infants Settlement Act, 18 & 19 Vict. c. 43 (extended to Ireland by the 23 & 24 Vict. c. 83), it has been enacted that from and after the passing of the act, viz. 2nd July, 1855, (Sect. 1)— Operation of 18 & 19 Vict. c. 43.

“It shall be lawful for every infant in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property or property over which he or she has any power of appointment whether real or personal, and whether in possession, reversion, remainder or expectancy; and every conveyance, appointment and assignment of such real or personal estate, or contract to make a con-

(i) *Honywood v. Honywood*, 20 Beav. 451.

(k) *Simpson on Infants*, 314; *Seton*, 755 *et seq.* For mode of application and proceedings thereon, see *Dan. Ch. Pr.*, 5th ed., vol. 2, pp. 1208—1211.

(l) *White v. Herrick*, L. R., 4 Ch. 345.

(m) *Kent v. Burgess*, 11 Sim. 361; *Wade v. Hopkinson*, 19 Beav. 613.

(n) *Cave v. Cave*, 15 Beav. 225.

As to the binding effect on a ward after she had attained twenty-one and on her husband of an order to settle her real estate, see *Blackie v. Clark*, 15 Beav. 595; and for further observations on the subject of wards of Court and their settlements, see notes to *Eyre v. Countess of Shaftesbury*, Wh. & Tu. L. C., vol. 2, pp. 633 *et seq.*, and *Seton*, pp. 763 *et seq.*

Chap. IX. s. 6. veyance, appointment or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be executed by an infant."

By sect. 2 it is provided—

"That in case any appointment under a power of appointment or any disentailing assurance shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void."

By sect. 3 it is provided that—

"The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given upon petition presented by the infant or his or her guardian in a summary way without the institution of a suit: and if there be no guardian the Court may require a guardian to be appointed or not, as it shall think fit; and the Court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition."

And by sect. 4 it is provided—

"That nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years."

It has been decided that a petition under this Act does not constitute the applicant a ward of Court, and that therefore the only duty imposed on the Court is to look to the propriety of the proposed settlement, but not to inquire as to the fitness of the intended marriage, although the former inquiry might sometimes involve the latter (o).

Evidence re-
quired.

By Judges' Reg., 8th August, 1857, r. 20, evidence must be produced to show (1) the age of the infant; (2) whether the infant has any parents or guardians; (3) with whom, or under whose care, the infant is living, and, if the infant has no parents or guardians, what near relations the infant has; (4) the rank and position in life of the infant and parents; (5) what the infant's property and fortune consist of; (6) the age, rank and

(o) *In re Dalton*, 6 De G., M. & G. 201; but see *Re Strong*, 26 L. J., Ch. 64.

position in life of the person to whom the infant is about to be married; (7) what property, fortune and income such person has; (8) the fitness of the proposed trustees, and their consent to act (*p*).

In *Re Yates* (*q*), where the infant was a ward of Court, and entitled to a reversionary interest, two petitions were presented, one for a reference to chambers to approve of the settlement, and the second entitled in the matter of the Act (18 & 19 Vict. c. 43) and in the suit, to sanction her execution of the settlement when so approved of.

Practice
under the
Act.

But in *Re Olive* (*r*), where a petition had been presented under the Act, and the female infant's fortune was large, V.-C. Kindersley referred the whole matter to chambers; and this is the present practice, one petition only being necessary (*s*). A petition is necessary, although a suit has been already instituted (*t*).

It has been held that the Court may under this Act sanction a post-nuptial settlement of a ward made with its approval (*u*); but if the infant is not a ward of Court, there is no such power (*x*). Where an infant, for whom an order for maintenance had been made, married without a settlement, the Court varied a post-nuptial settlement, so as to insert a covenant to settle her future property in accordance with a previous draft settlement (*y*).

Post-nuptial
settlement
may be
sanctioned.

(*p*) Seton, vol. 2, p. 724.

(*q*) 7 W. R. 711.

(*r*) 11 W. R. 819.

(*s*) Dan. Ch. Pr., 5th ed., vol. 2, p. 1211; Seton on Decr., vol. 2, p. 274.

(*t*) *Pearreth v. Marriott*, W. Notes (1866), p. 48.

(*u*) *Powell v. Oakley*, 34 Beav. 575; *Re Wall*, 25 Ch. D. 482.

(*x*) See also *Wortham v. Pember-ton*, 1 De G. & Sm. 644; *Re Potter*, L. R., 7 Eq. 484.

(*y*) *Re Hoare's Trusts*, 11 W. R. 181; and see *Re Hodge's Settlement*, 3 K. & J. 213, where it was decided on a petition under this act that an order for maintenance constituted a young lady a ward of Court.

CHAPTER X.

MARRIAGE SETTLEMENTS.

SECTION I.

SETTLEMENTS IN PURSUANCE OF ANTE-NUPTIAL ARTICLES.

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Chap. X. s. 1. WHERE the marriage has taken place on the faith of ante-nuptial articles, the parties have a right to insist on the execution of such articles by a proper deed of settlement; and for this purpose a Court of Equity will, if necessary, lend its assistance to compel specific performance (a). The deed ought, of course, to carry out the intention of the articles, however inartificially they may have been framed (b); and where the articles would, if literally followed, give to the husband an estate tail, equity will carry them into effect by limitations in strict settlement.

Conformity of settlement to articles.

(a) *Grier v. Grier*, L. R., 5 H. L. 688, 706.

(b) *Sackville-West v. Holmesdale*, L. R., 4 H. L. 543.

For, as Lord Chancellor Macclesfield said in *Trevor v. Trevor* (c), Chap. X. s. 1. "Articles are only minutes or heads of the agreement of the parties, and ought to be modelled when they come to be carried into execution, *so as to make them effectual.*" The husband, Sir John Trevor, by the terms of the articles, would have had an estate tail which he could immediately bar. Therefore his Lordship held that the intention evidently was only to give him an estate for life; "otherwise the settlement would be vain and ineffectual; and if a settlement were made defective in any particular, it would not be final or conclusive, and a second settlement must be made till the uses were well and duly raised."

According to the report of this case in Peere Williams (d), Lord Macclesfield said, "That marriage articles were in their nature executory, and ought to be construed and moulded in equity according to the intention of the parties. Now that intention was plain. . . . And it would be a strange and vain construction of the articles if Sir John should have such an estate by them, the limitations of which the very next day he might by a fine destroy." There would, in such a case, be no settlement at all.

By marriage articles, which recited that the intended husband had received a sum of 600*l.* from his intended wife, a jointure of 60*l.* a year was provided for her, charged upon the husband's land, with the ordinary powers of distress and entry; and it was thereby agreed that the intended husband should settle all the residue and remainder of the said land *upon his issue* by the intended wife after the payment of the said sum of 60*l.* a year.

(c) 1 Eq. Ca. Abr. 387, pl. 7. See Journals of House of Lords, vol. 21, p. 221, where the judgment affirming Lord Macclesfield's decree is set out.

(d) Vol. I., p. 631. The earliest case on the point is that of *Jones v. Laughton*, in 1698, 1 Eq. Ca. Abr. 392, pl. 2, which was as follows:—Upon a marriage, articles were entered into, whereby it was agreed that the wife's portion should be

laid out in the purchasing of lands, which should be settled on the husband and wife for their lives and the life of the longest liver of them, and after to the heirs of the body of the wife by the husband to be begotten; yet the Master of the Rolls, Sir John Trevor, decreed the settlement to be to the first and other sons, &c., so as the husband and wife might not have power to bar the issue.

Chap. X. s. 1. On the construction of these articles, it was decided (e) that effect should be given to the word "issue," by giving estates tail to the children of the marriage, the sons taking successively, and the daughters together; and also that there was no power to charge the lands with portions in favour of younger children.

General rule. The general rule as to reforming settlements framed upon ante-nuptial articles, is thus laid down by Lord Chancellor Talbot (f): "Where articles are entered into before marriage, and settlement made after marriage, different from the articles, this Court will set up the articles against the settlement." That is to say, the Court will order the settlement to be reformed. And for this purpose no other evidence is necessary (g).

Where both articles and settlement are ante-nuptial.

Where both the articles and the settlement are prior to the marriage, any discrepancy between them will in general be presumed to have arisen from some change of mutual intention while matters remained open; and, consequently, in such a case the settlement will stand. For, as Lord Chancellor Talbot said in *Legg v. Goldwire* (f), "Where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles." Articles are considered in a Court of Equity as minutes only which the settlement may explain more at large (h). But if the settlement expressly declares that it is made *in terms of the articles*, and yet in fact differs from them; in such a case the settlement will be reformed and made to correspond with the articles. A very remarkable instance of equitable interposition for this purpose occurred in the well-known case of *West v. Errissey* (i), where a settlement copying the very words of the articles was reformed, although both the articles and the settlement were made before the marriage.

(e) *Grier v. Grier*, L. B., 5 H. L. 688.

(f) *Legg v. Goldwire*, Cas. Temp. Talb. Forr. 20. See also *Streatfield v. Streatfield*, *ibid.* 176; *Lambert v. Peyton*, 8 H. L. Cas. 1; *Roberts v. Kingsley*, 1 Ves. sen. 238: for further cases, see notes to Lord

Glenorchy v. Bosville, Wh. & Tud. L. C., 5th ed., vol. 1, pp. 21, 26.

(g) *Cogan v. Duffield*, 2 Ch. D. 44.

(h) *Blandford v. Marlborough*, 2 Atk. 542.

(i) 2 P. Wms. 349; 1 Bro. P. C. 225; and see *Honor v. Honor*, 1 P. Wms. 123.

Upon this case, however, Lord Chancellor Talbot remarked (*k*), Chap. X. s. 1. "although in the case of *West v. Errisey*, the articles were made to control the settlement made before marriage, yet that resolution no way contradicts the general rule; for in that case the settlement was expressly mentioned to be made in pursuance and performance of the said marriage articles, whereby the intent appeared to be still the same as it was at the making the articles." When the articles and indenture of settlement bear date on the same day, they must be considered as one and the same act, and a different construction ought not to be put upon them (*l*).

The Court will not rectify a settlement on the ground of a mistake, unless the evidence, both as to the mistake and as to the real intention of the parties, be perfectly clear and satisfactory. Thus, where a post-nuptial settlement recited an ante-nuptial agreement, which was not forthcoming, the Court refused to rectify the settlement in accordance with the recital; the presumption being rather that the articles had been inaccurately recited, than that the settlement, which had been acted on for a long time, was incorrect (*m*). In an earlier case (*n*), on the occasion of an intended marriage between the only son of an English marquis and the daughter of a Scotch earl, the terms of settlement were incorporated in "proposals" which were approved of by the respective fathers on behalf of their children. The "proposals," after sundry other stipulations, concluded with a proviso that the settlement should contain "all usual and necessary clauses." A settlement was accordingly prepared in London, of which the general provisions were in conformity with the terms of the proposals. And the marriage took place. Many years afterwards the Scotch earl died, leaving a large personal estate, out of which his daughter, unless barred by the settlement, would have been entitled to

Evidence of mistake must be clear.

(*k*) Cas. Temp. Talb. Forr. 20; see also, remarks of Lord Chancellor Loughborough, in *Randall v. Willis*, 5 Ves. p. 275.

(*l*) *Heneage v. Hunloke*, 2 Atk. 456.

(*m*) *Mignan v. Parry*, 31 Beav. 211.

(*n*) *Marquis of Breadalbane v. Marquis of Chandos*, 2 Myl. & Cr. 711.

Chap. X. s. 1. claim *legitim* (o). A bill was filed against the husband and wife, alleging, that, according to Scotch law, a clause barring this *legitim* was "a usual and necessary clause" within the meaning of the "proposals," and should, therefore, have been introduced into the settlement, which, inasmuch as it contained no such clause, ought to be reformed. The bill prayed a declaration accordingly. Lord Chancellor Cottenham held, that the father of the lady, in approving of the proposals, must be considered to have acted, not adversely to, but on behalf of his daughter; and that there was no sufficient evidence to show that the proposals constituted the final contract of the parties, and had not been varied by some subsequent agreement prior to the execution of the settlement.

Articles construed with reference to subject-matter.

Evidence admitted to show that articles were the final contract.

Where articles themselves are incorrect.

In the same case it was held that articles are always to be construed with reference to the subject-matter. And, accordingly, where the articles related solely to English subject-matter, a clause barring Scottish *legitim* could not (in the absence of express words) be supposed to have been in contemplation of the parties (p). But evidence is admissible to show that the articles were the final agreement between the parties, and that the difference between them and the settlement was caused by mistake; and in such a case the Court ordered the settlement to be rectified by the articles (q).

It may happen that the articles themselves do not correctly express the intention of the parties; and where the mistake is clearly established, they, like all other instruments, will be reformed. Thus, in the case of *The Duke of Bedford v. The Marquis of Abercorn* (r), where articles before marriage stipulated that estates should be limited to the first and other sons of the marriage in tail, it was proved that the real intention was to limit the estates to the first and other sons in tail male; and the Court, after the marriage, directed that, in the settlement to

(o) *Legitim* is a term of Scotch law, importing a child's proportionate share of the parent's personal estate, which the parent cannot defeat by testamentary disposition.

(p) But a different doctrine was

apparently propounded in *Duke of Bedford v. Marquis of Abercorn*, 1 Myl. & Cr. 312.

(q) *Bold v. Hutchinson*, 5 De G., M. & G. 558; and see cases cited in White & Tud. L. C., vol. 1, p. 43.

(r) 1 Myl. & Cr. 312.

be executed, limitations as corrected by the evidence should be Chap. X. s. 1. inserted.

The question, what evidence it is necessary to adduce in order to establish the real intention of the parties, was also discussed in this case; and it seems that articles may be corrected on the same evidence which suffices to rectify an executed settlement (s). Lord Cottenham, L. C., in delivering judgment, said (t) :—

Evidence
admissible.

“If a settlement had been actually executed, in conformity with these articles, and it could be shown by proper evidence, that some provision in it had been inserted by mistake, and contrary to the intention of the parties, and to the contract previously made between them, it would have been within the province of the Court to have corrected the error, and altered the settlement accordingly. There cannot, therefore, be any doubt of the authority and the jurisdiction of the Court, to correct any errors which may be proved to have arisen in framing the agreement which the parties actually signed.”

If, therefore, parol evidence is admissible to show the real intention of the parties after a settlement has been executed, it will *a fortiori* be admissible where articles only have been entered into.

In *Smith v. Iliffe* (u), a marriage settlement was executed, in pursuance of articles made under an order of the Court on the marriage of a lady, an infant and a ward of Court, whereby personality of the wife was limited, after the death of the husband and in default of children, both of which events happened, as the wife should by will appoint, and in default of appointment to her next of kin. Upon her uncontradicted but uncorroborated evidence that she never understood that she was to be deprived of the control of her own property in the event of her becoming a widow and childless, it was held that she was entitled to have the settlement rectified by limiting the property in the events which had happened to herself absolutely. This was effected by endorsing on the settlement the declaration of the Court.

(s) As to the admission of parol evidence in cases of rectification, see Taylor on Evidence, 7th ed. 591.

(t) *Duke of Bedford v. Marquis of Abercorn*, 1 Myl. & Cr. p. 331.

(u) L. R., 20 Eq. 666. See also *Cook v. Fearn*, 27 W. R. 212; *Edwards v. Bingham*, 28 W. R. 89;

Stanley v. Pearson, 13 Ch. D. 545; *Lovesey v. Smith*, 15 Ch. D. 655. Slight evidence will be sufficient to satisfy the Court when there is a strong probability upon the instrument that a mistake has been made. See *In re De la Touche's Settlement*, L. R., 10 Eq. 599.

Chap. X. s. 1.

Where settlement decreed against purchasers.

Articles directing the insertion of "all usual powers," &c.

A settlement will not be decreed as against purchasers for value (an expression which includes mortgagees) without notice of the articles, but it will be decreed against them if they have notice (v).

Where the articles in general terms directed the insertion in the settlement of "all usual powers," &c., a question frequently arose what powers were included in such words. Thus, in giving effect to these words, powers of leasing, selling, exchanging, and re-investing, of varying securities (x), and powers of partition where there was any joint property, as well as powers of appointing new trustees (y), which latter are now unnecessary, have been inserted in the settlement (z); and although, as before observed, articles are to be construed with reference to their subject-matter, yet where a stipulation was made by antenuptial articles that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions usually found in settlements made in England, this was held to authorize the insertion of a power of sale and exchange under which lands in England might be taken in exchange for lands in Ireland; Lord Cottenham remarking that he could "see nothing in the contract to make it necessary to restrict the power to Ireland" (a).

"There is," said Sir L. Shadwell, "a palpable distinction between inserting in a settlement powers for the management and better enjoyment of the settled estates which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, to raise money for any particular purpose, &c." (b); and accordingly powers

(v) *Warrick v. Warrick*, 3 Atk. 291; *Davies v. Davies*, 4 Beav. 54; and see Sugden, V. & P. 781, 14th ed.

(x) *Sampayo v. Gould*, 12 Sim. 426.

(y) Lewin on Trusts, 7th ed., p. 115; the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 31.

(z) *Peake v. Penlington*, 2 Ves. & Bea. 311; *Hill v. Hill*, 6 Sim. 136.

See now the Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 3.

(a) *Sampayo v. Gould*, *ubi supra*. See also *Lindow v. Fleetwood*, 6 Sim. 152; *Duke of Bedford v. Marquis of Abercorn*, 1 Myl. & Cr. 312. But see *Marquis of Breadalbane v. Marquis of Chandos*, 2 Myl. & Cr. 711.

(b) *Sampayo v. Gould*, 12 Sim. 426.

of jointuring and charging require clearer evidence of intention to insert them than the expression "the usual powers" (c). Chap. X. s. 1.

In the case of *The Duke of Bedford v. Marquis of Abercorn* (d), a power was reserved in ante-nuptial articles to husband and wife to alter and vary the provisions of the articles as they should think fit. This was held not to authorize the insertion in the settlement, after marriage, of a power enabling the husband to jointure a future wife, or to charge portions for the younger children of a future marriage. And where certain powers were expressly specified in the articles, the direction to insert "the usual powers" in the settlement was held not to extend them (e).

But this question is now of little importance, for the "usual powers" are now for the most part supplied by the Conveyancing Acts of 1881 and 1882, and the Settled Land Act, 1882 (f). New acts conferring powers.

The Court will rectify a settlement on petition under the Practice. Trustee Relief Act (g).

By the Divorce and Matrimonial Causes Acts (20 & 21 Vict. c. 85, and 22 & 23 Vict. c. 61), extensive powers of dealing with settled property upon a divorce or judicial separation are conferred upon the Court; and these powers can now, by virtue of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3, be exercised notwithstanding that there are no children of the marriage. The trustees of the settlement cannot be heard in support of an application to the Court to alter the settlement, but they may be heard in opposition to such an application (h). Divorce and Matrimonial Causes Acts.

A clause in marriage articles providing for a subsequent separation will not be enforced, and any instrument, so far as it provides for such an event, will not be carried into effect. Clauses contemplating separation.

(c) Jarm. Bythewood, vol. 9, p. 61; *Higginson v. Barneby*, 2 Sim. & Stu. 516. And see *Sackville-West v. Holmesdale*, L. R., 4 H. L. 543; *Welman v. Welman*, 15 Ch. D. 570.

(d) 1 Myl. & Cr. 312.

(e) *Pearse v. Baron*, Jac. 158.

(f) 44 & 45 Vict. c. 41; 45 & 46

Vict. c. 39; 45 & 46 Vict. c. 38.

(g) *Lewis v. Hillman*, 3 H. L. Cas. 607; *Re De la Touche's Settlement*, L. R., 10 Eq. 599; *In re Bird's Trusts*, 3 Ch. D. 214. See, however, *Re Malet*, 30 Beav. 407.

(h) *Corrance v. Corrance*, L. R., 1 P. & M. 495.

Chap. X. s. 1. Such a clause is void whether in articles or in a settlement, and whether the instrument be post-nuptial or ante-nuptial (*i*).

Enforcement
of marriage
articles
though con-
sideration on
one side fail.

Marriage articles will be enforced on behalf of the husband, though he has not fulfilled his part of the agreement. An example of this is furnished by a case where there was an agreement by the wife's father to settle three-tenths of his estate, and the husband agreed to settle 2,000*l.* and insure his life. He effected no insurance, no settlement was executed, and the wife died without issue: it was held that he was entitled to prove in the administration of the father's estate in respect of his life interest in three-tenths of such estate, the performance by one party not being a condition precedent to his right to claim against the other; though, if the wife or any issue were alive, the Court would take care that the husband obtained no benefit until he had performed his part of the agreement (*k*).

Case of wife's
adultery.

Marriage articles will also be enforced on behalf of the wife, although the money consideration moving from her has not been paid; as where there was an agreement by the intended husband to settle a jointure in consideration of a portion given by the wife's father, though the portion was not paid, yet the wife took her jointure (*l*); and this, although she was living in a state of adultery. At common law, dower was not forfeited by adultery. The forfeiture of dower was introduced by the Statute of Westminster 2, c. 34. A jointure is not forfeited by adultery; and the Court will interpose at the suit of a wife to compel the performance of marriage articles, though her husband prove that she is guilty of the grossest infidelities (*m*).

(*i*) *H. v. W.*, 3 K. & J. 382; *Cartwright v. Cartwright*, 3 De G., M. & G. 982; *Westmeath v. Westmeath*, Jac. 126; *Cocksedge v. Cocksedge*, 14 Sim. 244; 5 Hare, 397.

(*k*) *Jeston v. Key*, L. R., 6 Ch. 610.

(*l*) *Perkins v. Thornton*, 1 Amb. 502.

(*m*) *Seagrave v. Seagrave*, 13 Ves. 439, 443. *Per* Lord Chancellor Talbot, "The articles being, that the husband shall settle such and such lands in certainty on his wife, the

plaintiff, for her jointure; this is pretty much in the nature of an actual and vested jointure, in regard to what is covenanted for a good consideration to be done, is considered in equity in most respects as done; consequently this is a jointure, and not forfeitable either by adultery or an elopement. The reason of the difference why a wife in case of an elopement with an adulterer forfeits her dower, and yet the husband leaving his wife and living with another woman

SECTION II.

ANTE-NUPTIAL SETTLEMENTS.

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A SETTLEMENT made in contemplation of marriage does not seem to become binding on the intended husband and wife until

does not forfeit his tenancy by the curtesy, is because the Statute of Westminster 2, c. 34, does, by express words, under these circumstances create a forfeiture of dower. But there is no act inflicting in the other case the forfeiture of a tenancy by the curtesy." *Sidney v. Sidney*, 3 P. Wms. at p. 276; *Evans v. Cur-*

rington, 6 Jur., N. S. 268; 2 D., F. & J. 481; where it was held by V.-C. Wood that the Court of Chancery had no jurisdiction to relieve a husband from the stipulations in his marriage settlement, upon a decree for dissolution of marriage being made by the Divorce Court.

Chap. X. s. 2.

How far settlements can be varied or revoked before marriage.

Chap. X. s. 2. the marriage has actually taken place. According to the civil law, matrimonial conventions and settlements are subject to the implied condition *si nuptiæ sequantur* (n). And it has been held that, where the marriage was void, a settlement made in anticipation of it was likewise invalid, and that the parties might make a new settlement; which, if followed by a proper marriage, was as effectual as though the first settlement had never been executed. This was the case in *Robinson v. Dickenson* (o), where it appeared that, in contemplation of a marriage, certain settlements were made, of real estate belonging to the intended wife, and of personalty belonging to the intended husband, upon trusts to arise after the marriage, for the benefit of the husband and wife and their issue. The marriage was solemnized, and the parties lived together as husband and wife. But after the lapse of some time, it was discovered that the marriage (for want of the requisite consent under Lord Hardwicke's Act) (p) was void; whereupon deeds were executed purporting to revoke the former settlements. And some time afterwards a new settlement in contemplation of marriage was made including the same property, but differing from the former deeds in the interests given to the issue, and in other particulars. The parties then validly intermarried, and had issue. In these circumstances Lord Chancellor Lyndhurst said that the Court "will not hold that a transaction, founded entirely on mistake and misapprehension of the parties, ought to be considered as binding on them"; and he accordingly decided that the first settlements were not binding; and that the rights of the parties, both as to the real estate and the personalty, must be governed by the second settlement.

When the marriage does not take place.

When no valid marriage is possible, as between a man and his deceased wife's sister, a settlement, in which the intended marriage is recited, and by which property is conveyed to trustees, in trust for the settlor until the solemnization of the marriage, and after the solemnization thereof, in trust for the parties and their issue, creates a continuing trust for the settlor, and the trusts subsequent to the intended marriage never

(n) 6 Pothier (Ed. Dupin.) 46, 47.

(p) See *ante*, p. 6.

(o) 3 Russ. 399.

arise (q). But a settlor can, in contemplation of such a union, create a complete and irrevocable voluntary settlement, which cannot afterwards be impeached either by himself or by his representatives (r). And where a *feme sole*, in contemplation of a marriage which never took effect, settled personalty upon trusts for herself till the marriage, and then upon certain trusts for her issue, and the contemplated marriage never took place, but she married another person, it was held that the settlement was irrevocable (s). Chap. X. s. 2.

But in the case of *Page v. Horne* (t), the question discussed before Lord Langdale was, whether, after the execution of an ante-nuptial settlement, the intended husband and wife had power, before the solemnization of the marriage, to revoke the deed by which a mortgage of a sum of 1,500*l.* had been assigned to trustees upon certain trusts for the benefit of the parties and the issue of the intended marriage. The settlement in this case was not executory. The property was legally vested on certain trusts. Thirteen days after the execution of the deed and before the marriage, the intended husband and wife, having changed their minds, revoked it; and after the marriage the husband filed his bill, claiming the property under his marital right, as if there had been no settlement. The Court directed a reference to inquire under what circumstances the revocation had been executed. And on the cause coming on for further directions upon the master's report, Lord Langdale, under the circumstances of the case, dismissed the husband's bill, the lady not having had any independent advice or consultation with her friends. The learned judge admitted that the parties had a right to break off the contract of marriage and revoke the deed

In case the marriage does take place.

(q) *Chapman v. Bradley*, 4 D., J. & S. 71; *Pawson v. Brown*, 13 Ch. D. 202.

(r) *Ayerst v. Jenkins*, L. B., 16 Eq. 275.

(s) *McDonnell v. Hesilrige*, 16 Beav. 346. See, however, *Essery v. Cowlard*, 26 Ch. D. 191.

(t) 9 Beav. 570; 11 Beav. 227. It seems that Lord Langdale's de-

cision in this case might have been different if there had been any interruption of the intention to celebrate the marriage, or if the lady had acted independently of her husband upon a consultation with her friends. But see *contra Thomas v. Brennan*, 15 L. J., Ch. 420; *Mitford v. Reynolds*, 16 Sim. 130.

Chap. X. s. 2. of settlement if they chose to do so, or to call on the trustees to execute other deeds, and that they might under proper circumstances have entered into a new contract or made another contract giving the husband the whole interest in the fund.

When followed by a valid marriage, had in pursuance of it, the settlement is not only binding, but in all respects irrevocable; so that no directions in the will of the settlor, nor the state of his affairs at his decease, can alter its construction (*u*).

Where consideration moving from husband is executory, or his covenant is contingent.

Even where the husband is by the settlement a purchaser of his wife's choses in action, it is to be observed that if the provision for his wife and children be executory (*i. e.*, resting upon covenant), neither he nor his assignees will be allowed to recover them in equity, until the obligations of the settlement have been specifically performed. Thus in *Corsbie v. Free* (*v*), in consideration as well of 1,500*l.* of the wife's money which the husband was to have to his own use, as of a vested interest belonging to her of the value of 4,000*l.* in the residuary estate of a testator, divisible on the death of a tenant for life,—the husband by the settlement covenanted that his heirs, executors or administrators should immediately after his decease pay to the trustees of the settlement the sum of 4,000*l.* to be held on certain trusts for the wife and children of the marriage; but with a proviso that they should pay all other debts which the husband should owe at his death, in preference to the 4,000*l.*, and that they should not be bound to pay the 4,000*l.* unless the assets of the husband should be more than sufficient to pay all his other debts. Before the death of the tenant for life, the husband became bankrupt. Then the tenant for life died. Afterwards the husband himself died, leaving his wife him surviving. In these circumstances it was held by Lord Chancellor Cottenham that the assignees were not entitled to receive her share without performing the husband's covenant.

But if the covenant be contingent, and the husband's right immediate, the latter will not be postponed. Thus, suppose the husband to have covenanted that his executors should pay his

(*u*) *Vandeleur v. Vandeleur*, 3 Cl. & Fin. 82.

(*v*) Cr. & Phil. 64; *Pyke v. Pyke*, 1 Ves. sen. 376; *Mitford v. Mitford*, 9 Ves. 87, 96.

wife a sum of money, *if she survived him*, he would, if a purchaser by the settlement of her choses in action, be at liberty to sue for them at once, without making provision for the contingency (*w*). Chap. X. s. 2.

A covenant to settle other existing and after-acquired property of the wife was, and probably will continue to be, frequently inserted in marriage settlements. The object with which such a covenant was inserted, was partly to prevent the property from vesting in the husband, and partly to secure it for the benefit of the issue. Under the Married Women's Property Act, 1882, the *jus mariti* is during the coverture entirely abolished; and, accordingly, there is now no necessity to insert the covenant in order to deprive the husband of any interest in the property of his wife. It may, however, be desirable to save the wife from the coercion or blandishments of her husband, and to place beyond her control, as a safe provision for her children, whatever property she may be possessed of or entitled to at the time of the marriage, or which she may subsequently acquire. With this object the covenant may still be adopted; but it must be remembered that (at all events if the wife is a separate trader) such a covenant is liable to be impeached under the provisions of the bankrupt law.

Covenants to settle after-acquired property of the wife.

The alteration of the law, whereby the husband takes during the coverture no interest in his wife's property, also affects the form of the covenant, which should for the future be framed as the covenant of the wife, since she alone will be able to give effect to its provisions.

Cases of construction may still occasionally arise upon covenants framed in accordance with the previous law (*x*), the question to be determined being whether some particular property is or is not bound by the terms of the covenant; and this is simply one of intention which is to be collected from the settlement (*y*).

Construction of these covenants under old law.

The covenant which has to be construed may be expressed to be that of the husband and the wife, of the husband alone, or of

(*w*) *Basevi v. Serra*, 14 Ves. 313.

(*x*) See *Re Stonor's Trusts*, 24 Ch. D. 195.

(*y*) *Ramsden v. Smith*, 2 Drew. 298, 302; *Re Blockley*, 32 W. R.

385. For detailed investigation of this subject, see Peachey on Settlements, pp. 523—549; and Day. Conv. 3rd edit. vol. iii., pp. 194—218.

Chap. X. s. 2. the wife alone; or (and this is the form which has been most usually adopted in recent times) it may be framed as the agreement of all parties. In the case last mentioned, the agreement operates as a covenant by each of the parties in respect of the acts agreed to be done by him or her (z), and it will not be construed as a covenant by the husband in respect of separate property of the wife, over which he, of course, has no control (a).

In considering questions of construction as to the operation of these covenants, it must be borne in mind that each party covenants only as to what he or she can perform, and that the ordinary agreement of all parties constitutes a covenant by each in respect of the interests taken by him or her.

If the wife is bound by the covenant she must settle property coming to her for her separate use (b); and where she was an infant at the time of the marriage it has been held that the covenant, if for her benefit, was voidable and not void; and that she might, after attaining twenty-one, and during the coverture, elect whether the covenant should be binding on her separate estate or not (c). An exception of property "otherwise settled" had, it seems, the effect of excluding from the operation of the covenant property to which the wife became entitled for her separate use (d). The husband, being bound only so far as

(z) *Ramsden v. Smith*, 2 Drew. 298; *Smith v. Lucas*, 18 Ch. D. 531.

(a) *Dawes v. Tredwell*, 18 Ch. D. 354. The separate property of the wife is, *a fortiori*, not bound by the covenant of the husband alone. *Travers v. Travers*, 2 Beav. 179; *Douglas v. Congreve*, 1 Keen, 410; *Grey v. Stuart*, 30 L. J., Ch. 884. In *Lee v. Lee* (4 Ch. D. 175), a covenant by the husband alone to settle specific property of the wife was held after her death to be binding upon her, inasmuch as the agreement was entered into for valuable consideration, and the wife had assented thereto.

(b) *Milford v. Peile*, 17 Beav. 602;

Smith v. Lucas, 18 Ch. D. 531; *In re Allnutt*, 22 Ch. D. 275; *Scholfield v. Spooner*, 26 Ch. D. 94; not following *In re Mainwaring's Settlement*, L. R., 2 Eq. 487.

(c) *Smith v. Lucas*, *ubi supra*. See *Wilder v. Pigott*, 22 Ch. D. 263, where it seems to have been held that a married woman could confirm the settlement generally, and not merely so far as it affected the property of which she was then possessed. See also the Infant's Relief Act, 1874 (37 & 38 Vict. c. 62).

(d) *Kane v. Kane*, 16 Ch. D. 207, and see *Coventry v. Coventry*, 32 Beav. 612.

he is able to give effect to the covenant or agreement (*e*), the covenant, so far as he is concerned, is now of diminishing importance; and in settlements executed on or after the 1st January, 1883, no covenant on the subject ought to be inserted on the part of the husband. Chap. X. s. 2.

The time at which the property is acquired, in some cases affects the question whether it is bound by the covenant or not. What property is bound by the covenant. For this purpose property may be considered as divided into three classes:—(1) property belonging to the wife at the time of the settlement; (2) property acquired during the coverture; and (3) property acquired after its termination (*f*).

There may also be cases where the wife had, at the time of the settlement, a contingent or reversionary interest which subsequently, either during or after the coverture, fell into possession, or where the wife acquired during the coverture a reversionary interest which did not fall into possession until after its termination, and these, although not really distinct from the three classes referred to, occasionally add some difficulty to the interpretation of particular covenants. For the date of acquisition is sometimes regarded as that of the complete possessory title, and sometimes as that of the wife's obtaining a vested interest.

It is with reference to these several classes of property that the scope of the covenant under consideration has to be tested; and, as the actual interests which subsequently arise cannot be definitely foreseen when the covenant is framed, it is not surprising that difficult questions of construction have, in many cases, presented themselves for the decision of the Courts. In order to furnish a guide for the interpretation of covenants for the settlement of the wife's property, it will be desirable to ignore, as far as possible, the individual features of particular

(*e*) *Dawes v. Tredwell*, 18 Ch. D. 354.

(*f*) There is no reported case in which the property was acquired after the execution of the settlement and before the marriage; but it is conceived that this period may be

treated for purposes of construction as part of the period of coverture, unless the words "during the coverture" occur in the covenant, in which case it must be annexed to the preceding period.

Chap. X. s. 2. cases; and to extract from the decisions the principles upon which they have proceeded.

Two classes
of covenant.

The various covenants in all the reported cases may be divided into two groups, viz., those which relate solely to after-acquired property, and those which include, in addition to this, the present property of the wife. The former is a covenant to settle "all the property to which the wife or the husband in her right may at any future time become entitled;" the latter a covenant to settle "all the property to which the wife *now is*, or to which she or the husband in her right may at any future time become entitled." These types, from which all subsidiary provisions are excluded, must be carefully discriminated, in order to understand the numerous decisions on this subject.

As to future
property only.

I. As to covenants for the settlement of after-acquired property.

These covenants, containing words of futurity, but none relating to present interests, comprise property which falls into possession during the coverture (*g*), even though the wife had at the date of the settlement a reversionary (*h*) or contingent interest (*i*) therein. But the change from a contingent to a vested reversionary interest which does not fall into possession until after the coverture, is not sufficient to satisfy the words of futurity (*k*).

It has been held (*l*) that a covenant by the husband to settle, upon the trusts of the settlement, any property which his wife or he in her right should thereafter during the coverture succeed to the possession of or acquire, bound a sum of money in which, at the time of the marriage, the wife had a

(*g*) *Archer v. Kelly*, 1 Dr. & Sm. 300; *Re Clinton's Trust*, L. R., 13 Eq. 295.

(*h*) *Blythe v. Granville*, 13 Sim. 190; *Ex parte Blake*, 16 Beav. 463; *Spring v. Pride*, 4 De G., J. & S. 395; *Re Clinton's Trust*, *supra*.

(*i*) *Archer v. Kelly*, *supra*; *Brooks v. Keith*, 1 Dr. & Sm. 462.

(*k*) *Re Michell's Trusts*, 9 Ch. D. 5; reversing the decision of *Malins, V.-C.*, 6 Ch. D. 618.

(*l*) *Graftley v. Humpage*, 1 Beav. 46; affirmed on appeal, 3 Jur. 622. This case has been followed in *Re Hughes' Trusts*, 4 Giff. 432; *Rose v. Cornish*, 16 L. T. 786: referred to its special circumstances in *Hoare v. Hornby*, 2 Y. & C. C. C. 121; *Wilton v. Colvin*, 3 Drew. 617; *Re Wyndham's Trusts*, L. R., 1 Eq. 290; *Re Clinton's Trust*, L. R., 13 Eq. 295; and disapproved of in *Archer v. Kelly*, *supra*.

reversionary interest expectant on her own death without issue, and without having exercised a power of appointment. In this case, which has been often questioned, the husband was the survivor, and the decision of the Court, if it is to be supported, must rest on the reasoning of the Master of the Rolls, whereby he connects the husband's right to administration upon the death of his wife with the inchoate title which he acquired during the coverture. Covenants for the settlement of the wife's after-acquired property do not comprise existing property in possession (*m*), even if its amount has not been ascertained (*n*); nor existing reversions which remain without change during the coverture (*o*), or which merely become vested in interest, but not in possession (*p*). But reversionary interests which accrue during the coverture, even if they do not fall into possession until after its determination, are held to be bound by the covenant of the husband and wife (*q*), and by that of the husband alone if he survive his wife (*r*).

The better opinion seems to be that words of futurity in the husband's covenant are not satisfied by the interest which he may have acquired in the wife's property at the moment of marriage (*s*).

II. As to covenants for the settlement of present and future property.

As to present and future property.

In cases where the covenant is expressly extended so as to include existing interests of the wife not specifically mentioned

(*m*) *Hoare v. Hornby*, *supra*; *Otter v. Melville*, 2 De G. & Sm. 257; *Archer v. Kelly*, *supra*; *Re Wyndham's Trusts*, *supra*; *Re Browne's Will*, L. R., 7 Eq. 231; *Re Pedder's Settlement Trusts*, L. R., 10 Eq. 585.

(*n*) *Wilton v. Colvin*, *supra*; *Churchill v. Shepherd*, 33 Beav. 107.

(*o*) *Atcherley v. Du Moulin*, 2 K. & J. 186; *Re Wyndham's Trusts*, *supra*; *Re Pedder's Settlement Trusts*, *supra*; *Re Jones' Will*, 2 Ch. D. 362.

(*p*) *Re Michell's Trusts*, 9 Ch. D. 5.

(*q*) *Butcher v. Butcher*, 14 Beav. 222; *Dickinson v. Dillwyn*, L. R., 8 Eq. 546; *Cowper-Smith v. Anstey*, W. N. 1877, p. 28.

(*r*) *Townshend v. Harrowby*, 27 L. J., Ch. 553; *Hughes v. Young*, 32 L. J., Ch. 137.

(*s*) *Hoare v. Hornby*, *Archer v. Kelly*, *Churchill v. Shepherd*, all of which have been already cited *contra*; *Grafftey v. Humpage*, *supra*, and *James v. Durant*, 2 Beav. 177.

Chap. X. s. 2. in the settlement, property in possession and reversion, whether vested or contingent, and whether it exists at the date of the settlement, or is subsequently acquired during the coverture, will be bound by the covenant (*t*); even where the preceding interests were such as to render it impossible that the fund could fall into possession until after the death of both the husband and the wife (*u*).

A covenant to settle after-acquired property will in all cases be construed as applying only to interests acquired during the coverture, and not to property coming to the wife after the death of her husband, even if the words "during the coverture" are omitted (*x*); and notwithstanding that it is in form an assignment by the wife of all her future property (*y*). If the covenant is entered into by the husband alone, property given to the separate use of the wife is not bound by it (*z*); but if she is a covenanting party the property must be settled (*a*); and it seems that it is not in the power of a testator to exclude, except by a restraint on anticipation, a legacy to a married woman from the operation of such a covenant (*b*).

Rule of construction.

It is a general rule of construction which holds good in the case of these covenants, that operative words whose meaning is clear are not controlled by previous recitals (*c*), which can only be read to explain some doubt or ambiguity (*d*).

(*t*) *Re Mackenzie's Settlement*, L. R., 2 Ch. 345; *Agar v. George*, 2 Ch. D. 706. See, however, *Atcherley v. Du Moulin*, 2 K. & J. 186; *Dering v. Kynaston*, L. R., 6 Eq. 210.

(*u*) *Cornmell v. Keith*, 3 Ch. D. 767. See also *Re Jackson's Will*, 13 Ch. D. 189.

(*x*) *Dickinson v. Dillwyn*, L. R., 8 Eq. 546; *Carter v. Carter*, *ibid.* 551; *Re Edwards*, L. R., 9 Ch. 97; *Re Campbell's Policies*, 6 Ch. D. 686; *Welstead v. Leeds*, 47 L. T. 331; overruling *Stevens v. Van Voorst*, 17 Beav. 305.

(*y*) *Holloway v. Holloway*, W. N. 1877, p. 75.

(*z*) *Brooks v. Keith*, 1 Dr. & Sm. 462; *Douglas v. Congreve*, 1 Keen, 410, 423; *Travers v. Travers*, 2 Beav. 179; *Dawes v. Tredwell*, 18 Ch. D. 354.

(*a*) *Butcher v. Butcher*, 14 Beav. 222; *Milford v. Peile*, 17 Beav. 602; *Willoughby v. Middleton*, 2 J. & H. 344; *Campbell v. Bainbridge*, L. R., 6 Eq. 269.

(*b*) *Re Allnutt*, 22 Ch. D. 275; *contra*, *Re Mainwaring's Settlement*, L. R., 2 Eq. 487; and see *Kane v. Kane*, 16 Ch. D. 207; *Scholfield v. Spooner*, 26 Ch. D. 94.

(*c*) *Young v. Smith*, L. R., 1 Eq. 180; *Dawes v. Tredwell*, 18 Ch. D. 354.

(*d*) *Atcherley v. Du Moulin*, 2 K.

The nature of the property as well as the date of its acquisition may affect the question whether it is included in the covenant or not. Thus, in the absence of express provision for the conversion of terminable interests, property given to the wife for her life, whether with (e) or without (f) a restraint on anticipation, will not be bound by the covenant. Property given to the wife in such terms that a forfeiture of the gift would result from settling it in pursuance of the covenant seems to be outside the covenant; so, also, is a sum of money subject to a gift over, in case of the death of the wife without leaving a husband or issue her surviving (g); but where it is merely expressed to be "for her separate use independently of her husband," and the effect of the covenant would be to give the husband an interest in the property, it has been held to be bound (h).

Unless the covenant is so expressed as to include all property over which the wife has a power of disposition, she will not be

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Nature of property may exclude it from covenant.

& J. 186; *Wilton v. Colvin*, 3 Drew. 617; *Re Michell's Trusts*, 9 Ch. D. 5. The following cases may be usefully consulted on the meanings to be attributed to certain words or expressions of frequent recurrence in these covenants. "Accrue," *Hoare v. Hornby*, 2 Y. & C.C.C. 121; *MacLurcan v. Lane*, 7 W. R. 135; "become entitled," *Archer v. Kelly*, 1 Dr. & Sm. 300; *Blythe v. Granville*, 13 Sim. 190; *Re Clinton's Trusts*, L. R., 13 Eq. 295; "be or become entitled," *Atcherley v. Du Moulin*, 2 K. & J. 186; "come to," *Ex parte Blake*, 16 Beav. 463; "possessed," *Wilton v. Colvin*, 3 Drew. 617. As to the exception of property below a certain value, and the manner of estimating such value in the case of reversionary interests, see *Re Mackenzie's Settlement*, L. R., 2 Ch. 345; *Bower v. Smith*, L. R., 11 Eq. 279; *Steward v. Poppleton*, W. N. 1877, p. 29, where the report of

Bower v. Smith in the authorized reports is stated by Jessel, M. R., to be defective in not stating that there was a gift over in default of appointment; *Hood v. Franklin*, L. R., 16 Eq. 496; *Re Jackson's Will*, 13 Ch. D. 189. It may be mentioned as one of the incidents of these covenants that they will effect a severance of a joint estate in cases where the interest, if sole, would be bound thereby. *Caldwell v. Fellowes*, L. R., 9 Eq. 410; *Baillie v. Treharne*, 17 Ch. D. 388.

(e) *Ewart v. Ewart*, 11 Hare, 276; *Forster v. Davies*, 4 D., F. & J. 133.

(f) *Townshend v. Harrowby*, 27 L. J., Ch. 553; and see *Duncan v. Cannan*, 21 Beav. 307.

(g) *Hilbers v. Parkinson*, 25 Ch. D. 200.

(h) *Re Alnutt*, 22 Ch. D. 275, not following *Re Mainwaring's Settlement*, L. R., 2 Eq. 487; and see *Scholfield v. Spooner*, 26 Ch. D. 94.

Chap. X. s. 2. obliged to settle property given to her in tail (*i*), or over which she takes a general power of appointment (*k*). But if the wife in exercise of the power appoints the property to herself, it becomes subject to the covenant (*l*).

A gift in default of appointment confers a vested interest subject to be divested by the exercise of the power (*m*). Accordingly such an interest devolving on the wife is bound by a covenant to settle her property; but, if an appointment is made to the person entitled in default, this creates a new interest; and the question whether it is bound or not must be determined without reference to the previous interest (*n*); even, it seems, where the share taken is the same under the appointment and in default under the settlement creating the power (*o*).

Covenants to settle after-acquired property of the husband.

A covenant by the husband to settle all his after-acquired property is rarely inserted in marriage settlements; for it is difficult to give to such a covenant a reasonable construction, and in the event of the husband's subsequent bankruptcy, it is exposed to the risk of being declared void as against his trustee.

In *Lewis v. Madocks* (*p*) a contract on marriage to settle all the personal estate that the husband should at any time during the coverture be possessed of, was construed to exclude income, unless it was laid up as capital, but to include real estate purchased with borrowed money. It seems doubtful how far an unlimited covenant of this description is, even when the husband is solvent at the date of the settlement, capable of being supported against his creditors. In *Ex parte Bolland* (*q*), the husband, who was a trader (*r*), by a settlement dated the 7th

(*i*) *Hilbers v. Parkinson*, 25 Ch. D. 200.

(*k*) *Ewart v. Ewart*, *supra*; and see *Ramsden v. Smith*, 2 Drew. 298, 306.

(*l*) *Ewart v. Ewart*, *supra*.

(*m*) See *Re Jackson's Will*, 13 Ch. D. 189.

(*n*) *Sweetapple v. Horlock*, 11 Ch. D. 745, where the previous cases, *Re Frowd's Trusts*, 10 L. T. 367; *Re Vizard's Trusts*, L. R., 1 Ch. 588, and *De Serre v. Clarke*, L. R.,

18 Eq. 587, are examined by the late Master of the Rolls, Sir G. Jessel.

(*o*) *Sweetapple v. Horlock*, *supra*.

(*p*) 8 Ves. 150; 17 Ves. 48. See also *Gartshore v. Chalie*, 10 Ves. 1; *Prebble v. Boghurst*, 1 Swanst. 309; *Hardey v. Green*, 12 Beav. 182.

(*q*) L. R., 17 Eq. 115.

(*r*) The distinction between traders and non-traders has been abolished by the Bankruptcy Act, 1883.

April, 1868, covenanted with the trustees, that all his future Chap. X. s. 2.
real and personal estate should be conveyed to the trustees upon the trusts thereby declared concerning certain specific items of property comprised in the settlement. In February, 1873, the husband, who was admitted to have been solvent at the date of the settlement, was adjudicated a bankrupt, and the covenant was declared void as against the trustee. Sir James Bacon, V.-C., in the course of his judgment, observed :

“I am not aware of any case in which such a settlement as this has been held to be binding. . . . Nothing can be more directly opposed to the plain reason and justice and policy of the law than that a man, whether in fraud or not, should on his marriage undertake that whatever fragment of property he may acquire during the coverture, down to the smallest particular, should be subject to the trusts which are supposed to be declared by this settlement. There are many cases in which such settlements have been set aside. There are many cases in which the policy of the law has been declared to be that a man cannot withdraw from his creditors, even in consideration of marriage, future property which he may acquire, if at the time other persons, namely, his creditors, have the right to be paid out of the property.”

The learned judge, in deciding this case, seems to have rested his decision upon general principles of law, and not to have called in the aid of the 91st section of the Bankruptcy Act, 1869 (*s*), which he has in a more recent case (*t*) held to be retrospective. By the 47th section of the Bankruptcy Act, 1883 (*u*), which is a re-enactment of the former section, with the important omission of the words “by a trader,” it is enacted as follows : Bankruptcy Act, 1883.

“Any covenant or contract made, in consideration of marriage, for the future settlement on or for the settlor’s wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.”

(*s*) 32 & 33 Vict. c. 71.

Eq. 433.

(*t*) *Ex parte Dawson*, L. R., 19

(*u*) 46 & 47 Vict. c. 52.

Chap. X. s. 2. This section does not apply to a covenant by the husband to pay a sum of money to the trustees of the settlement, who will, in such a case, be admitted to prove in his bankruptcy (*x*).

Where a trader was entitled, in default of appointment, to a share of his father's residuary estate, which the widow had power to appoint among himself and the other children, and by his marriage settlement covenanted to settle his share whether appointed or unappointed, it was held by Malins, V.-C. (*y*), that, although the share which he ultimately took was under, and not in default of, an appointment, he had an estate or interest in the property at the date of the marriage, which saved the covenant from the operation of the 91st section.

Settlements
by insolvent
husband.

Settlements made before and in consideration of marriage are excepted from the operation of the Bankruptcy Acts (*z*); but, under the general law, such settlements made by the intended husband when he is practically insolvent will not be sustained if the intended wife is privy to the fraud (*a*).

Property
coming from
any other
person than
the husband
may be for-
feited on his
bankruptcy or
insolvency.

Property coming from the wife, or her friends, or the friends of the husband, may be settled in such manner as to be forfeited by the husband on his bankruptcy or insolvency. This has been long since decided (*b*). But the interest must be such as to determine on that event; and where there was no power of applying the trust fund otherwise than for the benefit of the tenant

(*x*) *Ex parte Bishop*, L. R., 8 Ch. 718.

(*y*) *Re Andrew's Trusts*, 7 Ch. D. 635.

(*z*) 32 & 33 Vict. c. 71, s. 91; 46 & 47 Vict. c. 52, s. 47.

(*a*) *Colombine v. Penhall*, 1 Sm. & Giff. 228; *Goldsmith v. Russell*, 5 De G., M. & G. 547; *Fraser v. Thompson*, 4 De G. & J. 659; *Bulmer v. Hunter*, L. R., 8 Eq. 46. See, however, *Campion v. Cotton*, 17 Ves. 264, 271; *Ex parte McBurnie*, 1 D., M. & G. 441.

(*b*) *Lockyer v. Savage*, 2 Str. 947. This was the first case in which it was held that the fortune of the

wife might be settled on the husband till his failure, and then to her separate use. The provision for the wife's maintenance was held good against creditors, as it was not a provision out of the bankrupt's estate, but a settlement out of the wife's own fortune. *Stephens v. James*, 4 Sim. 499; *Lester v. Garland*, 5 Sim. 205, 222; *Ex pte. Hinton*, 14 Ves. 598; *Montefiore v. Behrens*, L. R., 1 Eq. 171; and see *Re Pearson*, 3 Ch. D. 807, where it was held that the insertion of a trust for the settlor for life determinable on bankruptcy rendered a post-nuptial settlement void under 13 Eliz. c. 5.

for life, it was held that a proviso in a will restraining alienation did not prevent his interest from becoming vested in the assignee (c). Chap. X. s. 2.

Where the trustees of a settlement were directed to hold an estate in trust for the husband till he should become bankrupt or insolvent, and after his bankruptcy and the death of the wife, then during the remainder of his life upon trust to pay the rents for the maintenance and support or otherwise for the benefit of him and the issue, as they might think proper; it was held that the discretionary power of the trustees was not taken away by the bankruptcy, so as to enable the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were held entitled to the surplus (d).

But it seems now settled that, if there is an absolute discretion given to the trustees, that discretion will not be interfered with, and no part of the income can be claimed by the creditors (e).

In the case of *Montefiore v. Behrens* (f), where the wife became during the coverture absolutely entitled to a legacy of 500*l.*, and this sum was transferred to the trustees of the wife's settlement, under the trusts of which the husband took a life interest in it, determinable on bankruptcy; it was held that the limitation was valid.

With reference to what is meant by the term "insolvent," in a limitation of the kind now under consideration, where the income of settled property (not coming from the husband himself) is given to the husband "until he shall become bankrupt or insolvent;" it has been held, that where the word "insolvent" is used without a reference to the Insolvent Acts, it does not mean a technical insolvency, but a present inability to pay his debts, although, when all the assets are got in, the estate may ultimately prove solvent (g). What meant
by insolvency.

(c) *Green v. Spicer*, 1 Russ. & Haro, 185; *Page v. Way*, 3 Beav. Myl. 395; *Piercy v. Roberts*, 1 Myl. & 20.
K. 4.

(e) *Holmes v. Penney*, 3 K. & J. 90.

(d) *Wallace v. Anderson*, 16 Beav. 533; and see *Rippon v. Norton*, 2 Beav. 63; *Kearsley v. Woodcock*, 3

(f) L. R., 1 Eq. 171.

(g) *De Tastet v. Le Tavernier*, 1 Keen, 161.

Chap. X. s. 2.

The execution of a composition deed which recites inability to pay debts in full is "insolvency," upon which the gift over will take effect (*h*). And the execution of an inspectorship deed with a similar recital will have the same effect (*i*).

Montefiore v. Enthoven.

But where property was left by will to trustees, upon trust to pay the income of a daughter's share to her for life, and if she should leave a husband surviving, to him for life, or until he should become bankrupt, or take the benefit of any act for the relief of insolvent debtors, and after his decease or his bankruptcy, then over; and in the same will shares in reversionary property were given to sons, with a proviso that if, before their shares became payable, they should assign, charge, or otherwise dispose of the whole or any part thereof by way of anticipation, or become bankrupt, or take the benefit of any act for the benefit of insolvent debtors, or do anything whereby such shares should become vested in some other person, they should go over; and the daughter married, and died leaving a husband, who executed an inspectorship deed under "The Bankruptcy Act, 1861;" it was held, that he had not brought himself within the clause of forfeiture, the meaning of which, as explained by the similar clause affecting the son's shares, was that such an act should be done as to cause a *cessio bonorum* (*k*).

Forfeiture may take place though interest not in possession.

The gift over on his insolvency or bankruptcy will take place, even though the husband's interest be not in possession (*l*).

Words of futurity relating to bankruptcy include a pending bankruptcy (*m*), but are not to be construed so as to defeat the manifest intention of the testator, by creating a forfeiture where no transfer of interest has taken place. Accordingly, where the bankruptcy had been annulled before the first receipt of money under the gift, it was held that no forfeiture had occurred (*n*);

(*h*) *Re Muggeridge's Trusts*, Johns. 625.

(*i*) *Freeman v. Bowen*, 35 Beav. 17.

(*k*) *Montefiore v. Enthoven*, L. R., 5 Eq. 35.

(*l*) *Sharp v. Cosserat*, 20 Beav. 470.

(*m*) *Seymour v. Lucas*, 1 Dr. & Sm. 177; *Manning v. Chambers*, 1

De G. & Sm. 282.

(*n*) *White v. Chitty*, L. R., 1 Eq. 372; *Lloyd v. Lloyd*, L. R., 2 Eq. 722; *Trappes v. Meredith*, L. R., 9 Eq. 229; L. R., 7 Ch. 248; *Re Parnham's Trusts*, L. R., 13 Eq. 413; *Ancona v. Waddell*, 10 Ch. D. 157.

but it has been recently laid down, that, in order to avoid a forfeiture, the bankruptcy or other act which would have that effect must have been annulled or undone before the period of distribution, and not merely before the first receipt of money (*o*). Chap. X. s. 2.

But the property of the husband himself cannot be so settled as to divest on his bankruptcy (*p*). And it has been decided in an Irish case (*q*), that where a man settles his property so as to go over on his insolvency, and he executes an assignment in trust for his creditors, the event on which the gift over is to take place has occurred, but the gift over is void against the creditors. Husband's property cannot be limited to divest on his bankruptcy.

However, where real estate was settled upon trust to pay the rents to the settlor for life, or until he should incur it, or become bankrupt, and then to pay an annuity to his wife, and he first mortgaged the property, and then became bankrupt, the limitation was upheld, as the forfeiture arose upon the previous mortgage, and it was held not necessary to consider the validity of the limitation with reference to the subsequent bankruptcy (*r*). But limitation till he incur good.

Where, by mistake, the wife's property was made to appear to be the husband's, it was held that the settlement might be corrected, so as, conformably with the intention of the parties, to provide against the husband's bankruptcy or insolvency; and this although the settlement was complete and not executory (*s*). Settlement may be corrected where erroneous.

But no contrivance to evade the bankrupt laws will be sanctioned. Thus, a covenant by the husband in a settlement to pay a sum of money in the event only of his failing in his circumstances, will not, in the event of his bankruptcy, entitle the trustees to prove as creditors (*t*). No contrivance for evasion of the bankrupt laws sanctioned.

(*o*) *Samuel v. Samuel*, 12 Ch. D. 152; and see *Hurst v. Hurst*, 21 Ch. D. 278.

(*p*) *Higinbotham v. Holme*, 19 Ves. 88; *Ex parte Hodgson*, 19 Ves. 206. "The husband's property cannot be settled so as to make his life interest cease on bankruptcy, though his wife's may."—Per Sir Lancelot Shadwell in *Lester v. Garland*, 5 Sim. at p. 222.

(*q*) *Re Casey's Trust*, 4 Ir. Ch. Rep. 247; *Lewin*, 94 (*g*).

(*r*) *Brooke v. Pearson*, 27 Beav. 181; and see *Knight v. Browne*, 9 W. R. 515.

(*s*) *Higginson v. Kelly*, 1 Ball & B. 253; *Ex parte Verner*, 1 Ball & B. 260.

(*t*) *Ex parte Murphy*, 1 Sch. & Lef. 44.

Chap. X. s. 2.

*Holmes v.
Penney.*

In the case of *Holmes v. Penney* (*u*), it was held, that though a man's property cannot be settled on himself till bankruptcy or insolvency, it may be settled so as to give the trustees an absolute discretion to pay the income of it either to himself, his wife or children, and that such a limitation would be valid though the settlor became insolvent.

*Lester v.
Garland.*

In *Lester v. Garland* (*x*), a trader received a fortune of 5,000*l.* with his wife. No part of this sum was settled; but the husband, on his marriage, settled a sum of stock (his own property) in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent. And it was provided, that if he should survive his wife, and the issue of the marriage should fail, and he should then be, or should have been, a bankrupt, 15-66ths of the stock should belong to the wife's next of kin in blood. Although the settlement did not expressly state what was the consideration for this provision, Sir Lancelot Shadwell had no difficulty in holding that the limitation over on the bankruptcy was good to the extent of the 15-66ths, that being the proportion of the husband's stock which the wife's fortune would have purchased (*y*).

Forfeiture not
created by an
attempt to do
what is inter-
dicted.

A forfeiture cannot be created by a mere attempt to do the thing interdicted; for "*non efficit conatus nisi sequitur effectus*" (*z*).

Jones v. Wyse.

In *Jones v. Wyse* (*a*), the estate of the intended wife was vested upon trust to pay the rents and profits to the intended husband until he should become bankrupt, or insolvent, or until he should sell, alien, charge, or incumber the income, by way of anticipation, or *should attempt, or agree so to do*; and upon the

(*u*) 3 K. & J. 90.

(*x*) 5 Sim. 205. See also *Ex parte Hodgson*, 19 Ves. 206; *Ex parte Cooke*, 8 Ves. 353.

(*y*) As to what words denote an intention that the interest of a man shall cease, or be divested on bankruptcy or insolvency, see *Dommett v. Bedford*, 3 Ves. 149; *Doe v. Carter*, 8 D. & E. 300; *Wilkinson v. Wilkinson*, Coop. 259; *The King v. Robinson*, Wight. 386; *Shee v. Hale*, 13 Ves. 404; *Cooper v. Wyatt*, 5

Mad. 482; *Yarnold v. Moorhouse*, 1 Russ. & M. 364; *Lear v. Leggett*, 2 Sim. 479; *Godden v. Crowhurst*, 10 Sim. 642; *Montefiore v. Enthoven*, L. R., 5 Eq. 35.

(*z*) *Sir A. Mildmay's case*, 6 Co. 42 b. See also *Pierce v. Win*, 1 Vent. 321; *Foy v. Hynde*, Cro. Jac. 697; and the argument in *Stephens v. James*, 4 Sim. 499, at p. 504.

(*a*) 2 Keen, 285; and see also *Graham v. Lee*, 23 Beav. 388; *Re Stulz's Trusts*, 4 De G., M. & G. 404.

occurrence of any one of these several contingencies, upon trust for children; and in default of issue, there was a gift over. No issue sprung from the marriage; and the wife died. In this situation the husband, who had got into difficulties, made sundry endeavours to raise money on the settled property, but abortively. The question was, whether he had thereby given effect to the forfeiture. Lord Langdale determined in the negative; holding that there was nothing to preclude the husband from taking legal advice to ascertain what his powers were; and that he might do acts indicative of his wishes on the subject, without exposing himself to the penalties of the settlement. Chap. X. s. 2.

The 27 Eliz. c. 4, contains a provision which must be attended to, where *land* is proposed to be put in settlement. This statute enacts that every conveyance of lands, tenements or other hereditaments made for the intent and of purpose to defraud and deceive purchasers, shall be deemed and taken as against such purchasers only, to be utterly void, frustrate and of none effect; and also that every conveyance containing a clause of revocation or alteration shall be in like manner void as against subsequent purchasers for valuable consideration. On the construction of this statute, it has been decided that a voluntary conveyance is to be considered as fraudulent within the meaning of the Act (*b*); but even the consideration of marriage in an ante-nuptial settlement would not, if there were an actual fraudulent intent, protect the deed (*c*). The statute, however, does not extend to cases of personal estate (*d*); nor does it extend to particular powers, such as a power to charge a reasonable sum on a valuable estate (*e*). Operation of
27 Eliz. c. 4,
s. 5.

(*b*) *Doe d. Otley v. Manning*, 9 East, 59, and cases collected in Sugden, V. & P. p. 714, 14th ed. See *post*, p. 279, where the effect of this statute is more fully discussed.

(*c*) *St. Saviour's case*, Lane, 21, 22. The words of the resolution are, that "though the consideration of marriage be a good consideration, yet if a power of revocation be annexed to the deed, it is void as unto strangers"; and see *Tarback v. Mar-*

bury, 2 Ver. 510; *Cross v. Faustenditch*, Cro. Jac. 180; and even though the husband had released his power before he made the subsequent sale; 3 Rep. 83; *Bullock v. Thorne*, Moo. 615; and see Sug. on Pow., 8th edit. 642.

(*d*) As to who are entitled to claim the benefit of this statute, see Sug. on Powers, 8th edit. p. 646.

(*e*) *Jenkins v. Keymis*, 1 Lev. 150.

Chap. X. s. 2.

When Court
will rectify
settlements.

It has been already considered (*f*), in what cases the Court will rectify post-nuptial settlements based upon articles entered into before marriage. It requires a somewhat stronger case to enable the Court to interfere when the settlement, whether in pursuance of articles or not, has been executed before the marriage. There are, however, two grounds which confer this jurisdiction, viz., mistake and fraud.

On ground of
mistake.

(1) Mistake. The mistake must, in general, be common to both parties (*g*); but it seems that if they can be replaced in their original positions, this rule does not apply (*h*). If it can be shown that the deed does not contain what the parties have agreed upon, the settlement will be rectified (*i*); and if mistake be proved, a settlement will be reformed even after a long lapse of time (*k*). And it has been directed to be reformed in the case of a ward of Court, who waited till her majority, and married with a settlement which did not meet the approval of the Court (*l*). The usual practice is to direct the decree or declaration varying the settlement to be indorsed upon it; but in one case (*m*) a re-conveyance was directed.

In *Re Bird's Trusts* (*n*), it was held that the Court had jurisdiction upon a petition under the Trustee Relief Act to rectify the settlement, by inserting the word "heirs." In a previous case (*o*), the Court did not direct the settlement to be rectified, but prefaced the order with a declaration that it appeared that the words in question had been inserted by mistake, and thereupon made an order for distribution of the fund as if the clause had not been inserted.

(*f*) *Ante*, Chap. X. s. 1.

(*g*) *Sells v. Sells*, 1 Dr. & Sm. 42; *Rooke v. Lord Kensington*, 2 K. & J. 753; *Murray v. Parker*, 19 Beav. 305; *Earl of Bradford v. Earl of Romney*, 30 Beav. 431; *Cogan v. Duffield*, L. R., 20 Eq. 789; 2 Ch. D. 44.

(*h*) *Harris v. Pepperell*, L. R., 5 Eq. 1.

(*i*) *Pearce v. Verbeke*, 2 Beav. 333; *Marq. of Exeter v. Marchioness of Exeter*, 3 Myl. & Cr. 321; *Stock v. Vining*, 25 Beav. 235; *Torre v.*

Torre, 1 Sm. & G. 518; *Re De la Touche's Settlement*, L. R., 10 Eq. 599; *Lackersteen v. Lackersteen*, 30 L. J., Ch. 5.

(*k*) *Wolterbeek v. Barrow*, 23 Beav. 423.

(*l*) *Money v. Money*, 3 Drew. 256.

(*m*) *Malmesbury v. Malmesbury*, 31 Beav. 407; and see Form 3A in Seton on Decrees, p. 1681.

(*n*) 3 Ch. D. 214.

(*o*) *Re De la Touche's Settlement*, L. R., 10 Eq. 599.

Where the husband alleged that the settlement was contrary Chap. X. s. 2. to the agreement, but he knew its contents before executing it, which he did under protest, it was held he could not after marriage maintain a suit to rectify it (*p*).

Rectification may be ordered upon parol evidence (*q*), and, Evidence. after the death of the husband, on the uncontradicted evidence of the wife (*r*).

(2) Fraud. In *Harbidge v. Wogan* (*s*), it was alleged that a general power of appointment by the wife had been fraudulently omitted from the settlement: it was not proved that the instructions referred to such a power, nor that it was omitted by fraud; but it was shown that the power was inserted in the draft settlement and in the agreement; and an issue was directed whether the wife knew, when she executed the deed, that the power in question was not in it. On ground of fraud.

In *Clark v. Girdwood* (*t*), a widow, with children, entrusted her intended husband with the preparation of a settlement upon their marriage, and it was decided that he, having undertaken as agent of the wife to have a settlement prepared, was bound to have such a contract prepared as the Court would sanction, and accordingly the settlement was rectified so as to give the wife the first life interest in her own property. It was also held by the Court of Appeal that, as the solicitor had not participated in the fraud, there was no jurisdiction to make him pay the costs of the suit.

A barrister engaging to settle his wife's property is bound to make such a settlement as a conveyancer would draw or the Court sanction (*u*).

(*p*) *Eaton v. Bennett*, 34 Beav. 196.

(*s*) 5 Hare, 258.

(*q*) *Lackersteen v. Lackersteen*, 30 L. J., Ch. 5.

(*t*) 7 Ch. D. 9; see also *Lovesy v. Smith*, 15 Ch. D. 655.

(*r*) *Smith v. Iliffe*, L. R., 20 Eq. 666; *Cooke v. Fearn*, 27 W. R. 212; *Hanley v. Pearson*, 13 Ch. D. 545; *Lovesy v. Smith*, 15 Ch. D. 655.

(*u*) *Corley v. Lord Stafford*, 1 De G. & J. 238; and see *Clark v. Girdwood*, 7 Ch. D. 9; *Lovesy v. Smith*, 15 Ch. D. 655.

SECTION III.

POST-NUPTIAL SETTLEMENTS.

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Chap. X. s. 3. Where the settlement is post-nuptial, all those weighty and important considerations which spring from the independent position of the parties before matrimony, and from their altered state after it, are wanting. The husband and wife were formerly incapable of contracting with each other because the

In post-nuptial settlements, the marriage consideration is wanting.

wife was under the disability of coverture (*x*); and because her personality was merged in that of her husband. In equity, however, a wife might validly have contracted with her husband as to property limited to her separate use, or which she had power to dispose of independently of him. And now, by the Married Women's Property Act, 1882 (*y*), the doctrine of equity has received statutory recognition. Though in general post-nuptial settlements will for want of consideration be deemed voluntary, yet as articles entered into before marriage are founded upon valuable consideration, post-nuptial settlements made in pursuance of ante-nuptial articles will be held to be made on the valuable consideration of the articles; and this will be the case though the settlement make no mention of the previous agreement (*z*). A settlement, however, not in accordance with the articles is voluntary, though only so far as it differs from them (*a*).

Chap. X. s. 3.

Consideration
valuable
when in pur-
suance of
articles.

A parol agreement before marriage will not support a post-nuptial settlement (*b*), for the Statute of Frauds expressly enacts that all agreements made in consideration of marriage shall be in writing; and the marriage itself is, of course, no such part performance as to take the case out of the statute (*c*). There may be, however, acts of part performance independent of the marriage—such as the delivery of possession of land—the effect of which would be to validate the ante-nuptial parol agreement (*d*). Even if the parol ante-nuptial agreement be recited in the post-nuptial settlement, it will not render it valid against creditors (*e*). A recital of an ante-nuptial agreement in a post-

Parol agree-
ment before
marriage.

(*x*) "What I go upon is this, that here was no contract on the part of the wife. She was incapable of contracting, being under coverture." Per Lord Hardwicke in *Lanoy v. Duchess of Athol*, 2 Atk. 444, 448.

(*y*) 45 & 46 Vict. c. 75.

(*z*) *Ferrars v. Cherry*, 2 Vern. 383.

(*a*) *Jason v. Jervis*, 1 Vern. 284; *Gates v. Fabian*, 19 W. R. 61.

(*b*) *Goldicutt v. Townsend*, 28 Beav. 445.

(*c*) *Lassence v. Tierney*, 1 M. & G.

551; *Caton v. Caton*, L. R., 1 Ch. 137; 2 H. L. 127.

(*d*) *Surcome v. Pinniger*, 3 D., M. & G. 571; *Ungley v. Ungley*, 4 Ch. D. 73; 5 Ch. D. 887. See also *Williams v. Walker*, 9 Q. B. D. 576, when it was held that a parol post-nuptial contract between husband and wife as to the real estate of the latter, not being her separate property, could not be perfected by part performance.

(*e*) *Battersbee v. Farrington*, 1 Sw. 106; Sugd. Pow., 8th ed. 650.

Chap. X. s. 3. nuptial settlement "cannot, as against any person not a party to it, alter the consideration or the true character of the deed, or supply the want of other evidence of a binding ante-nuptial contract: but, I apprehend it is good evidence as between the parties, at all events, of the terms of and the considerations for their agreement *inter se*" (*f*). But where money has been transferred to trustees on trusts agreed on by parol only, and the settlement declaring the trusts and reciting the agreement is executed after the marriage, a perfectly valid consideration is given to the settlement (*g*).

Valuable consideration may move from third parties;

A post-nuptial settlement is often rendered unimpeachable by a valuable consideration moving from third parties. Thus, in *Wheeler v. Caryl* (*h*), Lord Hardwicke said, "If after marriage the father of the wife or other person, in consideration of the husband's making a settlement, advance a sum of money, such a settlement will be good and for valuable consideration" (*i*). And though the money be not paid at the time, yet if it be sufficiently secured the settlement will stand (*k*). And if a third party agree to advance money to pay the husband's debts on condition of his settling his property for the benefit of his family, such post-nuptial settlement has been held good against creditors, even though one debt be concealed by the settlor, and therefore not satisfied in accordance with the agreement (*l*).

Or by the wife relinquishing some interest,

So likewise the consideration may be the relinquishment of any valuable interest by the wife, as in *Cottle v. Fripp* (*m*), where she relinquished her jointure by fine in consideration of a provision, which, though post-nuptial, was held entitled to precedence over the husband's creditors. Or if the wife give up a former settlement made in consideration of marriage, or if she

(*f*) Per Lord Selborne, L. C., in *Codrington v. Lindsay*, L. R., 8 Ch., at p. 588.

(*g*) *Cooper v. Wormald*, 27 Beav. 266.

(*h*) Amb. vol. 1, 121.

(*i*) See *Thompson v. Webster*, 4 Drew. 628, 632; 4 De G. & J. 600.

(*k*) *Wheeler v. Caryl*, *ubi sup*.

(*l*) *Holmes v. Penney*, 3 K. & J.

90; *Ford v. Stuart*, 15 Beav. 493; see also *Bayspoole v. Collins*, L. R., 6 Ch. 228; and *Pott v. Todhunter*, 2 Coll. 76, though there the settled property was never actually in the power of the husband.

(*m*) 2 Vern. 220. See also *Lavender v. Blakstone*, 2 Lev. 147; and *Acraman v. Corbett*, 1 J. & H. 410.

give her separate property to the husband, or charge it for him, Chap. X. s. 3. in consideration of a post-nuptial settlement, such settlement will be good against creditors and purchasers (*n*). And upon the same principle the modification by the husband of his life estate in possession and by the wife of her inheritance forms a good and valuable consideration for a post-nuptial settlement (*o*).

The absence of any statement of consideration in the settlement itself is not conclusive as to its voluntary character, for it may be so connected with other transactions as to derive efficacy from them; and evidence of surrounding circumstances is admissible to show this connexion (*p*). A deed of settlement in form voluntary may be shown by extrinsic evidence to have been in fact made for valuable consideration (*q*). When the deed was expressed to be made in consideration of five shillings, "and divers other good and valuable considerations," but no evidence was adduced as to any other consideration than what appeared from the language of the deed itself, the Court directed an inquiry whether the settlement was founded upon any and what valuable consideration (*r*). It should also be borne in mind that a settlement voluntary in its inception may by subsequent dealings for value be rendered unimpeachable (*s*).

Though not stated may be proved.

(*n*) *Scot v. Bell*, 2 Lev. 70; *Arundell v. Phipps*, 10 Ves. 140; *Carter v. Hind*, 22 L. T. 116; *Whitbread v. Smith*, 3 De G., M. & G. 727, 739; see also *Harman v. Richards*, 10 Hare, 81.

(*o*) *Hewison v. Negus*, 16 Beav. 594; affirmed 17 Jur. 567. See also *Teasdale v. Braithwaite*, 4 Ch. D. 85; 5 Ch. D. 630; *Re Foster and Lister*, 6 Ch. D. 87; *Shurmur v. Sedgwick*, 24 Ch. D. 597.

(*p*) "If," says Lord Hardwicke, "there is a voluntary conveyance of real estate, or chattel interest, by one not indebted at the time, although he afterward becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud,

collusion, or intent to deceive subsequent creditors appears, that will make it void; otherwise not, but it will stand, though afterwards he becomes indebted. . . . A man actually indebted and conveying voluntarily always means to be in fraud of creditors, as I take it." *Townshend v. Windham*, 2 Ves. sen. 1, pp. 10, 11. See also *Battersbee v. Farrington*, 1 Swanst. 106; *Russell v. Hammond*, 1 Atk. 13; *Harman v. Richards*, 10 Hare, 81.

(*q*) *Pott v. Todhunter*, 2 Coll. 76. See also *Clifford v. Turrell*, 1 Y. & C. C. C. 138; *Townend v. Toker*, L. R., 1 Ch. 446, 459; *Bayspoole v. Collins*, L. R., 6 Ch. 228.

(*r*) *Kelson v. Kelson*, 10 Hare, 385.

(*s*) *George v. Milbanke*, 9 Ves. 190.

Chap. X. s. 3.

13 Eliz. c. 5.

It is now proposed to consider some of the decisions pronounced on the 13 Eliz. c. 5, which enacts that all conveyances of lands, tenements, hereditaments, goods and chattels, devised and contrived to delay, hinder or defraud creditors, shall as against such creditors be utterly void. The statute, however, contains a saving clause in favour of persons taking any estate or interest upon good consideration, and *bond fide* without notice of the fraud.

Settlement
for value void
if made with
intent to
defraud.

It is clear that a settlement for valuable consideration made with the intention of defrauding creditors is void under this statute (*t*). But in the words of Sir G. Turner, "those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have a task of great difficulty to discharge" (*u*). On the other hand, the mere fact of a settlement being voluntary is not sufficient to render it void as against creditors (*x*). There must be in all cases a fraudulent intention, though, as we shall see, this intention is lightly attributed in the absence of any valuable consideration.

Fraudulent
intention.

This fraudulent intention may be apparent on the face of the deed (*y*), or it may be presumed from all the circumstances of the case (*z*). Thus, the reservation to the settlor of a life estate determinable on bankruptcy (*a*), the fact that he was engaged (*b*), or about to engage (*c*), in speculative transactions, and the retention of the deed by the settlor, coupled with a power to mortgage the estate (*d*), have been held sufficient to indicate

(*t*) *Colombine v. Penhall*, 1 Sm. & G. 228; *Bulmer v. Hunter*, L. R., 8 Eq. 46; *Middleton v. Pollock*, 2 Ch. D. 104.

(*u*) *Harman v. Richards*, 10 Hare, 81, 89. See also *Copis v. Middleton*, 2 Madd. 410; *Re Johnson*, 20 Ch. D. 389; *Re Eyre*, W. N. 1881, p. 116.

(*x*) *Holmes v. Penney*, 3 K. & J. 90.

(*y*) *Spirett v. Willows*, 3 De G., J. & S. 293; *Re Pearson*, 3 Ch. D. 807.

(*z*) *Twyne's case*, 3 Rep. 80, b. A voluntary settlement executed

with the intention of defeating a sequestration was set aside as fraudulent in *Blenkinsopp v. Blenkinsopp*, 12 Beav. 568; 1 De G., M. & G. 495.

(*a*) *Re Pearson*, 3 Ch. D. 807.

(*b*) *Crossley v. Elworthy*, L. R., 12 Eq. 158.

(*c*) *Mackay v. Douglas*, L. R., 14 Eq. 106; *Ex parte Russell*, 19 Ch. D. 588.

(*d*) *Tarback v. Marbury*, 2 Vern. 510. See also *Jenkyn v. Vaughan*, 3 Drew. 419. Where the settlor continues in possession of the pro-

a fraudulent intention. The cases, however, which have most frequently called for the interference of the Court, have been those in which the settlor was indebted at the date of the settlement; and these we must distinguish, not only according to the degree of the settlor's indebtedness, but also with reference to the classes of creditors who seek to remove the settlement out of their way. Chap. X. s. 3.

If the settlor is actually insolvent at the date of the settlement, he has in fact no property which he has a right to settle; and, quite independently of the question how far the then existing creditors have been prejudiced, the settlement under those circumstances will be set aside as fraudulent (e), and "if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent" (f). When the settlor is proved to be insolvent shortly after the execution of the settlement, the onus is thrown upon him of establishing his solvency at the date of the settlement (g). Insolvency of settlor.

In *Holmes v. Penney* (h) Sir W. Page Wood, V.-C., stated the result of the authorities to be that— Result of authorities.

"The settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to

perty, and such possession is not justified by the terms of the deed, it throws doubt upon the *bona fides* of the transaction (*Twyne's case*, 3 Rep. 80; *Ryall v. Rolle*, 1 Atk. 165; 1 Ves. sen. 348; *Stileman v. Ashdown*, 2 Atk. 478); but is not of itself conclusive evidence of a fraudulent intention. *Alton v. Harrison*, L. R., 4 Ch. 622.

(e) *Crossley v. Elworthy*, L. R., 12 Eq. 158; *Mackay v. Douglas*, L. R., 14 Eq. 106; *Taylor v. Coenen*, 1 Ch. D. 636.

(f) Per Sir G. M. Giffard, L. J., in *Freeman v. Pope*, L. R., 5 Ch. 545.

(g) *Crossley v. Elworthy*, *supra*.

(h) 3 K. & J. at p. 99. In *Lush v. Wilkinson*, 5 Ves. 387, Lord Alvanley said the question must depend on whether the settlor was in insolvent circumstances at the time; but in *Richardson v. Smallwood*, Jac. 552, Sir T. Plumer held that it was not necessary to prove insolvency, if the settlor was largely indebted, the question being the intention to defraud creditors. See also *Kidney v. Coussemaker*, 12 Ves. 136; *Townsend v. Westacott*, 2 Beav. 340; *Skarf v. Soulby*, 1 Mac. & G. 364; *Kent v. Riley*, L. R., 14 Eq. 190.

Chap. X. s. 3. defraud the persons who at the time of making the settlement were creditors of the settlor. The mere fact of a man's making a voluntary settlement, and thereby parting with a large portion of his property, has never been held to make such a settlement fraudulent as against subsequent creditors."

Although the settlor is indebted at the date of the settlement, yet, if the debt is secured by a sufficient mortgage, it is clear that such a debt would not be evidence of fraud, and consequently would not invalidate the settlement (*i*).

When the deed provides for payment of settlor's debts.

A similar remark applies, where the settlement itself actually provides for the payment of the debts (*k*); and, subject to the law of bankruptcy, there is nothing to prevent a debtor from settling the whole of his property upon one or more favoured creditors (*l*).

Not necessary that debts should be actually due.

But it is not necessary that the debts should be absolutely due at the time of executing the settlement, or even that they should be certain; for it has been decided that the deed may be displaced by evidence of debts that were merely contingent (*m*).

Post obit covenant.

A post obit covenant in a marriage settlement may be sufficient to bring the case within the statute (*n*). Thus in the case of *Mattheus v. Feaver* (*o*), a man having property worth 1,000*l.*, but owing 300*l.*, made a voluntary settlement of all his property, which rendered him incapable of paying his debts, and it was consequently held a fraud under the statute. And where a trader by a post-nuptial settlement settled the whole

(*i*) *Stephens v. Olive*, 2 Bro. C. C. 90; *Lush v. Wilkinson*, 5 Ves. 384; and see *Ware v. Gardner*, L. R., 7 Eq. 317.

(*k*) *George v. Milbanke*, 9 Ves. 190; *Nunn v. Willemore*, 8 Term Rep. 521. See *Holmes v. Penney*, 3 K. & J. 90; *Re Johnson*, 20 Ch. D. 389.

(*l*) *Alton v. Harrison*, L. R., 4 Ch. 622; *Allen v. Bonnett*, L. R., 5 Ch. 577; *Ex parte Games*, 12 Ch. D. 314; *Spencer v. Slater*, 4 Q. B. D. 13; *Boldero v. London and Westminster Discount Co.*, 5 Ex. D. 47.

(*m*) In *Rider v. Kidder*, 10 Ves. 360, a husband by an ante-nuptial settlement covenanted for payment to his wife of 3,000*l.*, if she survived him. During the coverture he made a voluntary settlement upon another woman. He afterwards died. Lord Eldon held, that the voluntary settlement was a fraud upon the widow. See 1 Rep. 316.

(*n*) *Matheus v. Feaver*, 1 Cox, 278.

(*o*) 1 Cox, 278; and see *Walker v. Burrowes*, 1 Atk. 93.

of his property, both present and future, and became bankrupt Chap. X. s. 3. five years later, it was held that it was void against his assignees, as having been made with intent to defraud, though it did not appear that he was indebted at the time of its execution, except on mortgages of part of the settled property which had since been satisfied (*p*).

In the case of *Spirett v. Willows* (*q*), it was said by Lord Westbury, that if the debt of the creditor by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. This *dictum*, however, has been strongly disapproved of (*r*), and it manifestly substitutes for the fraudulent intention required by the statute to invalidate the settlement, the question whether the creditor was in fact prejudiced thereby.

Case of *Spirett v. Willows*.

Sir W. M. James, V.-C., has pointed out (*s*) the injustice and absurdity which would result from the rigid application of this doctrine.

"If," he says, "in the result, from some accident, a small debt remained unpaid for some years, and, by reason of a voluntary settlement and subsequent insolvency of the debtor, the creditor was delayed in the payment of his debt, then, however honest the settlement was, however solvent the settlor was at the time, if at the time he had 100,000*l.* and put 100*l.* in the settlement, and a creditor for 10*l.* happened to be unpaid in consequence of the settlor losing his money in the interval, that would be quite sufficient to set aside the voluntary settlement."

The actual decision in *Spirett v. Willows* was fully justified by the fraudulent intention which undoubtedly in that case furnished the motive of the settlement; and the remarks of the Lord Chancellor which have been cited were extra-judicial. They conflict with the previous cases which decided that the mere existence of a debt at the time of the settlement would not render it invalid; and it is submitted that *Spirett v. Willows* will

(*p*) *Ware v. Gardner*, L. R., 7 9 Eq. 206; *ibid.* 5 Ch. 538; *Re Johnson*, 20 Ch. D. 389.

(*q*) 3 De G., J. & S. 293, 302.

(*s*) *Freeman v. Pope*, L. R., 9 Eq.

(*r*) See *Freeman v. Pope*, L. R., at p. 211.

Chap. X. s. 3.

What creditors may impeach the deed.

Intention of defeating subsequent creditors.

not be followed so far as it lays down that mere indebtedness, as distinguished from substantial insolvency, will invalidate a voluntary settlement.

We have now to consider what creditors are entitled to impeach the settlement, and on this subject Sir William Grant, in *Kidney v. Coussmaker* (u), observed that: "although there has been much controversy, and a variety of decisions upon the question whether such a deed be fraudulent as to any creditors except such as were creditors at the time, I am disposed to follow the decision in *Montague v. Lord Sandwich* (x), which is that the settlement is fraudulent *only* as against such creditors as were creditors at the time."

But a voluntary settlement may be set aside under the statute, upon evidence of fraudulent intent, although there were no debts at the time of its execution. And this was held by Lord Hardwicke in *Stileman v. Ashdown* (y). Now it is clear that upon whatever ground the deed is invalidated, the property embraced by it is thrown open to the creditors at large, subsequent as well as prior (z).

When none of the creditors in existence at the date of the settlement remain unpaid, a strong case is required to establish a fraudulent intention of defeating subsequent creditors; and it seems to be now settled that the presumption of fraud is rebutted

(u) 12 Ves. 136.

(x) *Ibid.* 148.

(y) 2 Atk. 478; and see *Ware v. Gardner*, L. R., 7 Eq. 317, where the only debts were mortgage debts, and *Freeman v. Pope*, L. R., 5 Ch. 538; *Taylor v. Coenen*, 1 Ch. D. 636.

(z) *Jenkyn v. Vaughan*, 3 Drew. 419; *Townshend v. Windham*, 2 Ves. Sen. 1, 11; *Strong v. Strong*, 8 Beav. 408. A case of policies of assurance, which, since 1 & 2 Vict. c. 110, are held within the 13 Eliz. c. 5. *Walker v. Burrowes*, 1 Atk. 93; *Taylor v. Jones*, 2 Atk. 600; *Richardson v. Smallwood*, Jacob, 552, where Sir Thomas Plumer

said: "Suppose a person indebted, to execute a conveyance, which, against such creditors as were creditors at the time, would be void: then, if they are paid, and a new set of creditors stand in their places, does that make any difference?" And a deed having for its object to defeat future creditors is void under the act, as in *Barling v. Bishopp*, 29 Beav. 417, where, after notice of trial in an action, the defendant executed a voluntary conveyance to his daughter, and took the benefit of the Insolvent Debtors Act, the conveyance was held void, as being intended to defeat the plaintiff in the action.

by payment of all the existing debts. Cases may, of course, arise in which the circumstances amount to a fraud on subsequent, as well as existing, creditors, and then all the creditors have an equal equity to impeach the deed; but in the common case of a voluntary settlement, and a changing body of creditors, the right of a subsequent creditor is made to depend upon this, viz.: whether a single creditor whose debt was due at the date of the settlement still remains unpaid. Chap. X. s. 3.

In *Jenkyn v. Vaughan* (a) the position of subsequent creditors was fully discussed, and V.-C. Kindersley's judgment, from which the following extracts are taken, places the matter on a satisfactory basis:—

“It is not in dispute that a subsequent creditor is entitled to participate, if the instrument is set aside by any creditor; and I am not aware that in that case there is any distinction between the two classes of creditors, those who were so before and those who became so after the deed. I believe they all participate *pro rata*. It is clear, therefore, that a subsequent creditor has an equity to some extent, viz., a right to participate in the division of the property if the settlement is set aside.

“In cases where a subsequent creditor files a bill, it occurs to me that much may depend on this (supposing there is no evidence of anything to show the fraudulent intention but the fact of the settlor being indebted to some extent),—whether, at the time of filing the bill, any of the debts remain due which were due when the deed was executed. In such a case, as any of the prior creditors might file a bill, it appears to me that a subsequent creditor might do so too; but if at the time of filing the bill no debt due at the execution of the deed remains due, the distinction may be that then a subsequent creditor could not file a bill, unless there were some other ground than the settlor being indebted at the date of the deed to infer an intention to defraud creditors. But it appears to me, in the absence of authority to the contrary, that a subsequent creditor may file a bill, if any debt due at the date of the deed remains due at the time of filing the bill.”

It has been decided that a creditor under a voluntary *post obit* bond is as much entitled to the benefit of the statute as any other creditor (b). Voluntary creditor.

Since every kind of property can now be made available for the satisfaction of the claims of creditors, the distinctions which prevailed before the passing of 1 & 2 Vict. c. 110, as to property All property available for creditors.

(a) 3 Drew. 419.

(b) *Adames v. Hallett*, L. R., 6 Eq. 468.

Chap. X. s. 3.

which could, and that which could not, be taken in execution, are no longer of importance. It is clear that now a settlement of stock (c), or policies of assurance (d), or a purchase in the name of another (e), may be set aside under the statute.

How creditor may impeach settlement.

A creditor who seeks to impeach a settlement under the statute should sue on behalf of himself and all other creditors (f); but the plaintiff need not obtain a charging order (g), nor recover judgment (h) before commencing his action. No delay short of the statutory period of limitation will bar the plaintiff's right under the 13 Eliz. c. 5, to have a settlement declared void (i).

How far the settlement is avoided.

When the settlement has been declared void as against creditors, it seems that, whether the settlor be living or dead, the fund will be administered for the benefit of all the creditors, and no priority will be gained by the plaintiff (k).

Inasmuch as the settlement "is void only as against creditors, and to the extent to which it is necessary to deal with the estate for their satisfaction" (l), it is not the practice to order it to be cancelled (m).

As a general rule the costs of the action must be borne by the unsuccessful party; and when the deed is declared void against creditors, the persons actively supporting it are liable to pay the plaintiff's costs (n), which may be ordered to be taxed as between solicitor and client (o).

Even where the trustees or beneficiaries submit their interests

(c) *Barrack v. McCulloch*, 3 K. & J. 110. See *Rider v. Kidder*, 10 Ves. 360; *Sims v. Thomas*, 12 Ad. & E. 536.

(d) *Stokoe v. Cowan*, 29 Beav. 637.

(e) *French v. French*, 6 D., M. & G. 95.

(f) *Skarf v. Souby*, 1 M. & G. 364; *Reese River Silver Mining Co. v. Atwell*, L. R., 7 Eq. 347.

(g) *Goldsmith v. Russell*, 5 D., M. & G. 547.

(h) *Reese River Silver Mining Co. v. Atwell*, *supra*. See also *Colman v. Croker*, 1 Ves. 160; *Collins v. Burton*, 4 De G. & J. 612.

(i) *In re Maddever*, 31 W. R. 720.

(k) *Goldsmith v. Russell*, 5 D., M. & G. 547; *Adames v. Hallett*, L. R., 6 Eq. 468; *Reese River Silver Mining Co. v. Atwell*, *supra*.

(l) Per Sir William Grant in *Curtis v. Price*, 12 Ves. 89, 103, and see *Ex parte Bell*, 1 Gl. & J. 282.

(m) *Bott v. Smith*, 21 Beav. 511.

(n) *Crosley v. Elworthy*, L. R., 12 Eq. 158; *Mackay v. Douglas*, L. R., 14 Eq. 106; *Tanqueray v. Bowles*, *ibid.* 151; *Cornish v. Clark*, *ibid.* 184.

(o) *Goldsmith v. Russell*, *ubi supra*.

to the Court, the utmost which the Court can do is to make the decree without costs (*p*). Chap. X. s. 3.

Post-nuptial settlements of personal chattels, being bills of sale within the meaning of the Bills of Sale Act, 1878(41 & 42 Vict. c. 31), require to be attested and registered as provided by the 10th section of the Act; and if not so attested and registered within seven days after the making thereof, the settlement will be deemed fraudulent and void as against the trustee in bankruptcy and the execution creditors of the settlor (*q*). Where, however, the post-nuptial settlement is made in pursuance of an ante-nuptial agreement, it is a "marriage settlement," and is excepted from the definition of "bill of sale" contained in the Act (*r*). Voluntary settlements of chattels.

Chattels purchased after marriage, to replace those originally comprised in the settlement, will be within the protection of the marriage consideration (*s*).

By the 20th section of the Bills of Sale Act, 1878, it is enacted that chattels comprised in a bill of sale, which has been and continues to be duly registered under the Act, shall not be deemed to be in the possession, order or disposition of the grantor within the meaning of the Bankruptcy Act, 1869 (*t*); and it has been held that during the seven days allowed for registration the order and disposition clause of the Bankruptcy Act does not apply to the chattels (*u*). Although this section of the principal Act has been repealed by the Amendment Act of 1882 (*x*), yet, since the latter Act applies only to bills of sale by way of security for the payment of money, the repeal is limited to bills of sale of Bills of Sale Act, 1878.

(*p*) *Elsey v. Cox*, 26 Beav. 95; and see *Townsend v. Westacott*, 4 Beav. 58.

(*q*) See *Fowler v. Foster*, 5 Jur., N. S. 99; *Ashton v. Blackshaw*, L. R., 9 Eq. 510.

(*r*) *Courcier v. Bardili*, 27 Sol. Journ. 276.

(*s*) *Haslington v. Gill*, 3 Dougl. 415; *Courcier v. Bardili*, *supra*.

(*t*) 32 & 33 Vict. c. 71, s. 15, sub-s. 5. The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), contains a

provision similar to the "order and disposition" clause of the earlier Act. See s. 44, sub-s. 3. And by sect. 149 it is enacted that where by any Act or instrument reference is made to the Bankruptcy Act, 1869, the Act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of the present Act."

(*u*) *In re Hewer*, 21 Ch. D. 871.

(*x*) 45 & 46 Vict. c. 43, s. 15.

Chap. X. s. 3. that description (y) ; and chattels comprised in duly registered post-nuptial settlements are not to be regarded now, any more than before the Act of 1882, as in the order and disposition of the husband.

Effect of
bankruptcy.

The effect of the bankruptcy law upon voluntary settlements must now be briefly considered, and it must be borne in mind that, except in so far as they may be avoided by the provisions of a statute, voluntary settlements are good, not only against the settlor, but against all the world. By the 47th section of the Bankruptcy Act, 1883 (z), it is enacted that any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

Differences
between
Bankruptcy
Acts of 1869
and 1882.

This enactment differs from the corresponding clause of the Bankruptcy Act, 1869 (a), in two important particulars, viz.: (1) it applies to settlements made by all persons, and is not limited, as the earlier Act was, to those of traders ; (2) a new condition is introduced by the concluding words, which impose, as a condition of validity, that the persons claiming under the settlement must prove that the interest of the settlor in the property had passed to the trustee of the settlement on the execution thereof. These words are calculated to raise questions

(y) *Swift v. Pannell*, 31 W. R. 543.

(z) 46 & 47 Vict. c. 52.

(a) 32 & 33 Vict. c. 71, s. 91.

of considerable difficulty; but their main object seems to be to avoid, as against the trustee in bankruptcy, all voluntary settlements which the volunteers could not have enforced. Where, however, a settlor constitutes himself a trustee (*b*), the transaction may possibly be impeached under this section, although, as between the settlor and the objects of his bounty, it is perfectly valid. Again, a post-nuptial settlement of personal chattels, with a power to substitute others for those included in the settlement, although registered as a bill of sale, would, as regards the substituted chattels, be void under this section (*c*). And wherever the matter rests in contract, and is not completed by a transfer of the legal or equitable interest of the settlor, the title of the trustee in bankruptcy must necessarily prevail (*d*).

The extension of the former law to the case of non-traders—a change not introduced in this section alone, but which pervades the whole of the new Bankruptcy Act—is a still more important innovation.

It was decided on the construction of the corresponding section of the former Act that it applied to settlements executed before it came into operation (*e*), and a question of practical importance arises, namely, whether the substituted provision of the present Act is similarly retrospective, or whether past settlements are to be governed by the law in force at the date of their execution. If there had been no previous enactment on the subject, the case of *Ex parte Dawson* would be an authority in favour of construing the present section as retrospective, but the repeal of the Bankruptcy Act, 1869, is qualified in such a manner (*f*), that it is open to argument that settlements executed before the 1st January, 1884, must stand or fall under the Act in force at the date of their execution. It must, however, be observed that the words “property which has accrued

Whether provision retrospective.

(*b*) *Morgan v. Malletson*, L. R., 10 Eq. 475; *Baddeley v. Baddeley*, 9 Ch. D. 113; *Fox v. Hawks*, 13 Ch. D. 822; *Re King*, 14 Ch. D. 179.

(*c*) See *Courcier v. Bardili*, 27 S. J. 276, where there was no bankruptcy and the settlement was up-

held.

(*d*) See as to the impossibility of transferring a future interest, *Collyer v. Isaacs*, 19 Ch. D. 342.

(*e*) *Ex parte Dawson*, L. R., 19 Eq. 433.

(*f*) 46 & 47 Vict. c. 52, s. 169.

Chap. X. s. 3. to the settlor after marriage *in right of his wife*," unless indeed they have been blindly copied from the old Act, distinctly point towards a retrospective operation, inasmuch as after the 1st January, 1883, a husband can acquire no property in that manner. If the words, then, are to have any meaning, it must be with reference to settlements executed before that date. The similarity of the provisions of the two Bankruptcy Acts on this subject renders the decisions on the earlier a valuable guide to the construction of the later enactment, and it may, in the first place, be remarked that the 10th section of the Married Women's Property Act, 1870.(g), which enabled a married man to insure his life for the benefit of his wife, modified the provisions of the 91st section of the Bankruptcy Act, 1869, so far as related to the policies effected in pursuance of the Act (h).

The word "purchaser" in the 91st section means a buyer in the ordinary commercial sense, not a purchaser in the legal sense of the word, and accordingly the trustee of a post-nuptial settlement (i), to whom leaseholds subject to onerous covenants are assigned, is not a purchaser within the meaning of the section (k).

Onus of proof. Under the 13 Eliz. c. 5, the persons impeaching the settlement have to prove the insolvency or embarrassment of the settlor; under this section of the Bankruptcy Act, the *onus* of proof for ten years is shifted to the settlor. In determining whether a trader who has executed a voluntary settlement was within the meaning of this section "able to pay all his debts without the aid of the property comprised in such settlement," the value of the implements of his trade and of the goodwill of his business is not, if he intended to continue the business, to be taken into account; or at any rate only such a value can be taken into account as would be realized at a forced sale (l); and the abolition of the distinction between traders and non-traders does not, it is presumed, affect the soundness of this decision.

(g) 33 & 34 Vict. c. 93.

(h) *Holt v. Everall*, 2 Ch. D. 266.

And see Married Women's Property Act, 1882, s. 11.

(i) Per Jessel, M. R., in *Ex parte Hillman*, 10 Ch. D. 622.

(k) Compare *Price v. Jenkins*,

5 Ch. D. 619; *Ex parte Doble*, 28 W. R. 407.

(l) *Ex parte Russell*, 19 Ch. D.

588; see also *Ex parte Huatable*, 2 Ch. D. 54.

A voluntary settlement may, as we have seen, be impeached Chap. X. s. 3.
by *creditors* of the settlor under three different statutes, viz., Position of
the Statute of Fraudulent Conveyances (*m*), the Bills of Sale purchasers.
Act (*n*), and the Bankruptcy Acts (*o*); but there is another class of
persons—viz., subsequent purchasers for valuable consideration—
whose statutory rights must now be considered. They are, by
the 27 Eliz. c. 4, placed in a very similar position with refer-
ence to voluntary settlements, to that occupied by creditors
under the 13 Eliz. c. 5, except that the former statute does not
extend to personal chattels, whereas the latter is perfectly
general in its terms. It is enacted by the 27 Eliz. c. 4, that
every conveyance, grant, charge, lease, estate, incumbrance and
limitation of use of, in or out of any lands, tenements or other
hereditaments whatsoever, for the intent and of purpose to
defraud and deceive purchasers, shall be deemed and taken only
as against such purchasers to be utterly void, frustrate, and of
none effect (*p*). A saving clause is added, as in 13 Eliz. c. 5, in
favour of conveyances made “for good consideration and *bona*
fide” (*q*). By the 5th section any power of revocation or
alteration reserved to the settlor by the settlement renders it
void as against subsequent purchasers.

Although, as pointed out by Lord Mansfield (*r*), there is not Judicial in-
terpretation
of statute.
in this statute a word that impeaches voluntary settlements,
merely as being *voluntary*, but as *fraudulent and covinous*, a
long series of judicial decisions has established the construction,
that a conveyance without valuable consideration is by the
statute made void as fraudulent against a subsequent purchaser,
and this even when the purchaser had notice of the prior
settlement before the purchase-money had been paid, or the
conveyance executed (*s*).

The harshness of this interpretation, whereby “voluntary” is Tendency of
modern de-
cision.
made equivalent to “fraudulent,” has been mitigated by modern

(*m*) 13 Eliz. c. 5.

(*n*) 41 & 42 Vict. c. 31.

(*o*) 32 & 33 Vict. c. 71, and 46 &
47 Vict. c. 52:

(*p*) Sect. 2.

(*q*) Sect. 4.

(*r*) *Doe v. Routledge*, Cowp. 705.

(*s*) *Doe d. Otley v. Manning*, 9
East, 59, where the early authori-
ties are collected and reviewed. See
also the remarks of Sir G. Jessel,
M. R., in *Trowell v. Shenton*, 8 Ch.
D. 318, 325.

Chap. X. s. 3. decisions, the tendency of which is to lay hold of any, even the slightest, consideration, in order to exclude the operation of the statute. Thus, in the settlement of an equity of redemption, a covenant to indemnify the settlor against the mortgage debt is a sufficient consideration to support the settlement (*t*). "It is settled that if husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement, which is afterwards embodied in a settlement, that is, a bargain between husband and wife which is not a transaction without valuable consideration" (*u*). Any modification of the respective rights of husband and wife would therefore seem to be sufficient to import a valuable consideration; as, for example, the surrender by the husband of his tenancy by the curtesy, or the substitution of a life estate and power of appointment for the previous fee simple estate of the wife (*x*).

Assignment
of leaseholds.

It has been held in *Price v. Jenkins* (*y*) that an assignment of leasehold property, to which there is attached a liability to pay rent and perform covenants, is in itself a conveyance for valuable consideration; and in this case Sir W. M. James, L. J., laid it down that "if there is any valuable consideration for a settlement, the *quantum* of such consideration is of no consequence

(*t*) *Townend v. Toker*, L. R., 1 Ch. 446.

(*u*) Per Bacon, V.-C., in *Teasdale v. Braithwaite*, 4 Ch. D. 85, affirmed on appeal, 5 Ch. D. 630. See also *Hammonds v. Barrett*, 17 W. R. 1078, where the passage in the text is cited with approval.

(*x*) *Hewison v. Negus*, 16 Beav. 594, affirmed on appeal, 22 L. J., Ch. 655; *Re Foster and Lister*, 6 Ch. D. 87, where Sir G. Jessel, M. R., criticises *Goodright v. Moses*, 2 W. Bl. 1019; *Currie v. Nind*, 1 My. & Cr. 17, and *Butterfield v. Heath*, 15 Beav. 408. In *Shurmur v. Sedgwick*, 24 Ch. D. 597, Bacon, V.-C., considered the surrender by the husband of his curtesy out of the separate property of the wife in-

sufficient to create a valuable consideration.

(*y*) 5 Ch. D. 619. See also *Ex parte Doble*, 26 W. R. 407; *Re Greer*, I. R., 11 Eq. 502; *contra, Gardiner v. Gardiner*, 12 Ir., C. L. R. 565; *Hamilton v. Molloy*, 5 L. R., Ir. 339; *Lee v. Mathews*, 6 L. R., Ir. 167. The doctrine has no application to sect. 91 of the Bankruptcy Act, 1869, *Ex parte Hillman*, 10 Ch. D. 622, or to the 13 Eliz. c. 5; *Re Ridler*, 22 Ch. D. 74. See further, as to the smallness of the consideration, which will suffice to exclude the statute, *Thompson v. Webster*, 4 De G. & J. 600; *Ford v. Stuart*, 15 Beav. 493; *Bayspoole v. Collins*, L. R., 6 Ch. 228; *Rosher v. Williams*, L. R., 20 Eq. 210.

under the statute of *Elisabeth*." But in *Re Marsh and Earl Granville* (z), Sir C. Bowen, L. J., in observing upon this case, said:—

"It does not follow that if there is in the same deed a conveyance of freeholds as well as an assignment of leaseholds, the decision in *Price v. Jenkins* establishes that the liability to the covenants in the leaseholds is sufficient to support the concurrent conveyance of freeholds as being a conveyance for valuable consideration."

Although volunteers can, in the case of a complete trust, enforce its execution against the settlor, yet they cannot obtain an injunction to restrain him from selling the estate (a). And after a sale has taken place they have not, it seems, any equity against the purchase-money (b).

A mortgagee is a "purchaser" within the meaning of the Act (c), and a mortgage made to secure money previously advanced to the mortgagor without any agreement for a mortgage may be declared void (d).

The settlor cannot enforce specific performance of an agreement for sale of the settled property against an unwilling purchaser (e); the latter, however, can maintain an action for the recovery of the deposit (f).

But a purchaser for value from a settlor may enforce a subsequent agreement for sale, although he cannot make a title without the assistance of the statute (g). Specific per-

(z) 24 Ch. D. 11, 25.

(a) *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

(b) *Daking v. Whimper*, 26 Beav. 568; *Townend v. Toker*, L. R., 1 Ch. 446. See *Hales v. Cox*, 32 Beav. 118, where settled and unsettled properties were comprised in the same mortgages, and it was held that the children of the settlor, claiming as volunteers, were entitled to throw the mortgages on the unsettled estate, and to prove under the covenant for quiet enjoyment against the assets of the settlor for the damage they had sustained by the mortgage. See also *Pulvertoft*

v. Pulvertoft, *supra*.

(c) *Dolphin v. Aylward*, L. R., 4 H. L. 486.

(d) *Cracknall v. Janson*, 11 Ch. D. 1.

(e) *Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, Turn. & R. 281. Where the purchaser, however, was willing to complete on a good title being shown, a decree for specific performance was made in *Peter v. Nicolls*, L. R., 11 Eq. 391.

(f) *Clarke v. Willott*, L. R., 7 Ex 313.

(g) *Currie v. Nind*, 1 Myl. & Cr. 17; *Butterfield v. Heath*, 15 Beav. 408.

Rights of
volunteers.

No specific
performance
at suit of the
settlor.

Specific per-
formance at
suit of pur-
chaser.

Chap. X. s. 3. formance may also be decreed *against* a vendor who has made a voluntary settlement (*h*), and after his death against those claiming under the settlement (*i*).

The purchaser is entitled to bring before the Court the persons claiming under the settlement, in order that their interests may be bound (*k*). This is an exception to the general rule as to parties in actions for specific performance, namely, that the vendor and purchaser are the only proper and necessary parties to the action (*l*). It appears that a purchaser for value cannot insist upon a voluntary deed being delivered up to be cancelled (*m*), and the Court will not interfere actively against volunteers through the medium of persons not purchasers for value, but merely judgment creditors claiming under the settlor (*n*).

Settlement by
feme covert.

It has been decided that the 27 Eliz. c. 4, applies to a voluntary conveyance by a married woman of land not settled to her separate use (*o*), and, as she has all the powers of a *feme sole* with respect to her separate property, there can be no doubt that a voluntary settlement of such property may be avoided by a subsequent sale (*p*).

Copyholds, as well as freeholds, are within the statute (*q*).

(*h*) *Willats v. Busby*, 5 Beav. 193;
Daking v. Whimper, 26 Beav. 568;
Rosher v. Williams, L. R., 20 Eq.
210; *Trowell v. Shenton*, 8 Ch. D.
318.

(*i*) *Buckle v. Mitchell*, 18 Ves. 100.

(*k*) *Buckle v. Mitchell*, *supra*;
Townend v. Toker, L. R., 1 Ch. 446.
See, however, *De Hoghton v. Money*,
L. R., 2 Ch. 164.

(*l*) *Townend v. Toker*, *ubi supra*,
and see *Mole v. Smith*, Jac. 490;
Tasker v. Small, 3 Myl. & Cr. 63.

(*m*) See *De Hoghton v. Money*,
L. R., 1 Eq. 154, 159.

(*n*) *Dolphin v. Aylward*, L. R.,
4 H. L. 486.

(*o*) *Goodright v. Moses*, 2 Wms.
Bl. 1019; *Currie v. Nind*, 1 Myl. &
Cr. 17; *Butterfield v. Heath*, 15 Beav.
408. See, however, the remarks of
Jessel, M. R., upon this case in *Re*
Foster and Lister, 6 Ch. D. 87, 95.

(*p*) *Shurmur v. Sedgwick*, 24 Ch.
D. 597.

(*q*) *Doe v. Bottrick*, 5 Barn. & Ad.
131; *Currie v. Nind*, *ubi supra*.

CHAPTER XI.

RIGHTS OF MARRIED WOMEN.

SECTION I.

THE SEPARATE USE AND SEPARATE PROPERTY.

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Chap. XI. s. 1. THE doctrine of separate use formerly formed a most important branch of the law relating to married women. But, in consequence of the complete change in the law, and in the status of married women, effected by the Married Women's Property Act, 1882 (*a*), a knowledge of this doctrine and of the learning connected with it, has ceased to be requisite, except for the purpose of comprehending fully the value of the expression "separate property" in the Act, and of elucidating the cases of women married before the commencement of the Act, on whom property may devolve, the title to which shall have accrued before its commencement.

Importance of the doctrine of separate use.

Separate use unknown at common law. Formerly, at common law, the disabilities of coverture entirely precluded the wife from the enjoyment of property; whatever belonged to her while single, or came to her while covert, passed absolutely to the husband, or fell under his dominion. What was hers became his, and what was his remained his own. She could possess nothing; she could alienate nothing in her lifetime; she could bequeath nothing at her death (*b*). Such were the rigid maxims of the English marriage law.

Inability of the wife to enjoy or dispose of property at law.

Establishment of the separate use by Courts of Equity.

To remedy the injustice of this law, the Court of Chancery "invented that blessed word and thing, the separate use of a married woman" (*c*); a doctrine of the deepest importance, established by the Court of Chancery, under the wise administration of a succession of great men, without any help from the legislature. Hence, in equity, a married woman became enabled to enjoy property independently of her husband. And the

(*a*) 45 & 46 Vict. c. 75. The Act came into operation on 1st January, 1883.

(*b*) A married woman could not with certain exceptions make a will. But her husband might have waived the interest which the law gave him in her personal property, to the effect of enabling her to bequeath it. This waiver, however, he might have revoked even after her death before probate. And if he died be-

fore his wife the will was void, so far as it derived validity from his consent. For it might be valid in other respects; as if it were in execution of a power, or if it passed the right of representation to a third person to whom she was executrix. See *Noble v. Willock*, L. R., 8 Ch. 778; *ibid.*, 7 H. L. 580.

(*c*) Per L. J. James in *Ashworth v. Outram*, 5 Ch. D. 923, at p. 941.

effect was to protect her from the consequences of his improvidence, misfortunes, or misconduct, under a law which gave him a power, almost unlimited, over her person and her estate. Chap. XI. s. 1.

It is not here proposed to attempt an antiquarian review of this remarkable creation. Indications of it are discernible so early as the reign of Queen Elizabeth. It seems to have been plainly recognized by Lord Nottingham, Lord Somers and Lord Cowper. In Lord Hardwicke's time it was perfectly established; but it was not fortified and made secure till Lord Thurlow sanctioned the clause against anticipation; whereby the wife, for whose benefit this fabric had been reared, was precluded from destroying it (*d*).

Before the Married Women's Property Acts, 1870 (*e*) and 1882 (*f*), separate property might be acquired by the wife by contract with her husband before marriage, or by gift, either from her husband or from a stranger, wholly independent of such contract (*g*); but after marriage she was incapable of acquiring property by any act or exertions of her own, or of holding property in her own name. Separate property might, of course, devolve upon her by virtue of a will or under the trusts of a settlement, but in such cases the property was not acquired by any act of the wife. How it might be acquired.

In respect of her separate property, a married woman was regarded in equity as a *feme sole*; and to the extent of her rights and interests in such property, whether absolute or limited, she had power to alienate, to contract, and to enjoy, free from the control of her husband, as a *feme sole* (*h*). Married woman regarded in equity, in respect of separate property, as *feme sole*.

No particular form of words was necessary in order to vest property in a married woman to her separate use, but it was requisite that the intention to establish the separate use, if not. What words would create it.

(*d*) See *Pybus v. Smith*, 3 Bro. C. C. 340, and remarks of Lord Langdale, in *Tullett v. Armstrong*, 1 Beav. 1 at p. 22.

(*e*) 33 & 34 Vict. c. 93.

(*f*) 45 & 46 Vict. c. 75.

(*g*) Per Lord Langdale in *Tullett v. Armstrong*, 1 Beav. at p. 21.

(*h*) See *Johnson v. Gallagher*, 3 De G., F. & J. 494, 509.

Chap. XI. s. 1. expressed in words, should be clearly manifested (*k*). It was, of course, always created by the words *separate*, or *sole and separate* (*l*).

In ante-nuptial agreements the following words were held sufficient to create separate estate: "*the wife to dispose of all the rest of her estates*" (*m*); "*for her own sole use, benefit and disposition*" (*n*). But an agreement not executed by the wife, whereby the husband renounces his marital rights, is not effectual to create the separate use, or to confer upon the wife any power of disposition by will over her real estate (*o*).

In cases of bequests to married women, such words as "*her receipt to be a sufficient discharge to the executors*" (*p*); "*to be delivered up to her whenever she should demand or require the same*" (*q*); "*for her own use and at her own disposal*" (*r*); "*for their own use and benefit independently of any other person*" (*s*); "*to be at her disposal and do therewith as she shall think fit*" (*t*); "*to be by her laid out in what she shall think fit*" (*u*); "*for her own use independent of her husband*" (*x*); "*without comprehending their husbands*" (*y*); "*solely and entirely for her own use and benefit*" (*z*); "*for her support and maintenance*" (*a*); were held sufficient to create the separate use.

(*k*) As in *Ex parte Killick*, 3 Mont. D. & De G. 480; *Shewell v. Dwarries*, Johns. 172; *Green v. Britten*, 1 De G., J. & S. 649; *Austin v. Austin*, 4 Ch. D. 233. See also *Stanton v. Hall*, 2 Russ. & Myl. 175, 180; *Tyler v. Lake*, 2 Russ. & Myl. 183; *Kensington v. Dollond*, 2 Myl. & K. 184.

(*l*) *Massy v. Rowen*, L. R., 4 H. L. 288.

(*m*) *Petts v. Lee*, 4 Vin. Abr. 131, pt. 8.

(*n*) *Ex parte Ray*, 1 Madd. 199. But see *contra*, *Beales v. Spencer*, 2 You. & Coll. 651.

(*o*) *Dye v. Dye*, 13 Q. B. D. 147.

(*p*) *Lee v. Prieaux*, 3 Bro. C. C. 381.

(*q*) *Dixon v. Olmius*, 2 Cox, 414.

(*r*) *Prichard v. Ames*, Turn. & Russ. 222.

(*s*) *Margetts v. Barringer*, 7 Sim. 482.

(*t*) *Kirk v. Paulin*, 7 Vin. Abr. 95, pl. 43.

(*u*) *Atcherley v. Vernon*, 10 Mod. 519, 531.

(*x*) *Wagstaff v. Smith*, 9 Ves. 520. See also *Gurney v. Goggs*, 25 Beav. 334.

(*y*) *Dawson v. Bourne*, 16 Beav. 29.

(*z*) *Inglefield v. Coghlan*, 2 Coll. 247.

(*a*) *Cape v. Cape*, 2 J. & C. 543. Conf. *Austin v. Austin*, 4 Ch. D. 233, where trustees had an absolute discretion as to the application of the income.

But in similar cases the following words were held insufficient: *Chap. XI. s. 1.*
 “to and for her own use and benefit” (b); “into their own proper hands for their own use and benefit” (c); “for the sole use of;” even where the property was vested in trustees for the beneficiary (d). *What words were insufficient.*

In cases of a bequest to an unmarried woman, or a woman becoming discoverd by the death of the testator, a very clear intention to exclude the marital right of a future husband was necessary, in the absence of the word *separate*, to create the separate use (e).

In such cases, words such as “for her sole use and benefit” (f); “for and under their sole control” (g); “for her sole and absolute use and benefit” (h); “for the maintenance of herself and children” (i), even though the property was vested in trustees (k), were held insufficient to create the separate use.

It was decided in *Massy v. Rowen* (l), that the word “sole” was not a technical word in the sense of having a certain definite meaning, and that the use of it alone would not exclude the right of the husband.

Separate property might also be created by a limitation to a married woman for her separate use for life without any restraint on anticipation, followed by a general power of appointment by deed or will, with a final limitation to her executors and administrators (m).

(b) *Roberts v. Spicer*, 5 Mad. 491
Wills v. Sayers, 4 Mad. 409; — v. *Lyne*, Younge, 562; *Johnes v. Lockhart*, 3 Bro. C. C. 383, n.; *Jacobs v. Amyatt*, 1 Mad. 376, n.; *Kensington v. Dollond*, 2 Myl. & K. 184.

(c) *Tyler v. Lake*, 2 Russ. & Myl. 183; *Blacklow v. Laws*, 2 Hare, 40. See also observations of Hatherley, L. C., in *Massy v. Rowen*, L. R., 4 H. L. p. 296, overruling *Hartley v. Hurle*, 5 Ves. 540.

(d) *Massy v. Rowen*, *ubi supra*.

(e) *Gilbert v. Lewis*, 1 De G., J. & S. 38; *Goulder v. Camm*, 1 De G., F. & J. 146. See *Massy v. Rowen*, *ubi supra*, overruling *Adamson v.*

Armitage, 19 Ves. 416.

(f) *Gilbert v. Lewis*, 1 De G., J. & S. 38.

(g) *Massy v. Parker*, 2 Myl. & K. 174.

(h) *Lewis v. Mathews*, L. R., 2 Eq. 177.

(i) *Wardle v. Claxton*, 9 Sim. 524.

(k) *Adamson v. Armitage* can only be supported on the ground that there was an intention in the whole will to create the separate use. See *Massy v. Rowen*, L. R., 4 H. L. 288, 295.

(l) *Ubi supra*.

(m) See this subject more fully treated, *post*, Chap. XI. s. 2.

Chap. XI. s. 1.

Not affect the husband beyond the coverture.

The wife might defeat his claim.

On wife's death husband entitled to her separate chattels personal.

Semble. So also to her separate chattels real.

Tenant by the curtesy of her separate real estate.

Wife's separate choses in action might be recovered by husband as her administrator.

The separate use existed only in the married state; it ceased on the dissolution of the marriage (*e*). The legal rights of the husband were, therefore, not encroached upon beyond the coverture. If he survived his wife, his position with reference to her property, whether real or personal, was the same as if it had never belonged to her for her separate use, provided that it remained undisposed of at her death. For a wife, who had property to her separate use, had a power of disposition over it by act or deed *inter vivos*, or by deed to take effect after death, or by will.

Accordingly, if undisposed of by her, the wife's chattels personal in possession held or settled to her separate use, belonged at her death to her husband surviving absolutely (*n*).

The wife's separate chattels real probably followed the same rule, but the point does not appear to have been decided.

As regarded the wife's separate real estate, whether she were seised of a legal estate or possessed of an equitable estate of inheritance, it was settled that on the birth of issue capable of inheriting it, the husband surviving, if otherwise entitled, and not deprived by any disposition by the wife, was entitled as tenant by the curtesy (*o*).

If any of the wife's choses in action were not reduced into possession at her death and were undisposed of by her, the husband was entitled to sue for them as her administrator, and to retain them as his own property, though settled to her sole and separate use as if she were sole and unmarried. In the case of *Proudley v. Fielder* (*q*), Sir J. Leach said, "These moneys were

(*e*) A bill, however, filed against a *feme covert* in order to affect her separate estate was not defeated by the subsequent death of her husband; *Field v. Sowle*, 4 Russ. 112; *Nail v. Punter*, 4 Sim. 474; and it might be filed even after his death; *Heatley v. Thomas*, 15 Ves. 596; *Johnson v. Gallagher*, 3 De G., F. & J. 494.

(*n*) *Molony v. Kennedy*, 10 Sim. 254; *Askew v. Rooth*, L. R., 17 Eq. 426; *Johnstone v. Lund*, 15 Sim. 308; *Tugman v. Hopkins*, 4 Man. &

Gr. 389.

(*o*) *Morgan v. Morgan*, 5 Madd. 408; *Lushington v. Sewell*, 1 Sim. 435; *Roberts v. Diawell*, 1 Atk. 607; *Follett v. Tyrer*, 14 Sim. 125; *Hearle v. Greenbank*, 3 Atk. 715; *Appleton v. Rowley*, L. R., 8 Eq. 139; *Cooper v. Macdonald*, 7 Ch. D. 288, overruling *Moore v. Webster*, L. R., 3 Eq. 267.

(*q*) *Musters v. Wright*, 2 De G. & Sm. 777; *Drury v. Scott*, 4 Y. & C. Ex. 264.

to be for the sole and separate use of Mrs. Leader, as if she were sole and unmarried. This expression has no reference to the devolution of the property after her death. There is not a word to vest it in her next of kin, or to defeat the right which her surviving husband is entitled to acquire as her administrator." Ch. XI. s. 1.

So, where the wife of a bankrupt having separate choses in action died, leaving her husband surviving, the claim of the assignees to the separate property, so far as undisposed of by the wife, was allowed (r).

The wife was not formerly bound to maintain her husband out of her separate property, or to bring any part of it into contribution for family purposes. But her position in this respect has, as we have already seen, been altered by the Married Women's Property Act, 1882. Wife formerly not bound to maintain her husband.

The possession by the wife of separate property did not formerly relieve the husband from his liability for his wife's debts; for, except as to those contracted on the credit of her separate estate, he remained liable, as if his wife had no separate property (s). Possession of separate property by wife did not alter husband's liability.
The law upon this point would seem to have been altered by the recent legislation, and except in cases in which it can be shown that the wife is acting as the agent of the husband, or has authority to pledge his credit, the husband will be no longer liable for debts contracted by his wife, whether she does or does not possess separate property (t).

The separate use was held to affect not only the *corpus* of separate property, but also the produce of it, and the savings arising from, and investments of, such property (u); and the wife could retain whatever might come to her hands in her own possession, as a chattel over which her husband had no power (x). Separate use bound the produce as well as corpus.

(r) *Stead v. Clay*, 1 Sim. 294.

(s) Conf. *Johnson v. Gallagher*, 3 D. F. & J. 494; *Re Leeds Banking Co.*, *Mrs. Mattheuman's case*, L. R., 3 Eq. 781; *Butler v. Cumpston*, L. R., 7 Eq. 16; *Re London, Bombay and Mediterranean Bank*, 18 Ch. D. 581.

(t) See *ante*, pp. 95, 99.

(u) *Gore v. Knight*, 2 Vern. 535; *Fettiplace v. Gorges*, 1 Ves. jun. 46; *Cecil v. Juxon*, 1 Atk. 278; *Darkin v. Darkin*, 17 Beav. 578; *Churchill v. Dibben*, 9 Sim. 447, n.; *Brooke v. Brooke*, 25 Beav. 342; *Duncan v. Cashin*, L. R., 10 C. P. 554.

(x) Conf. *Cecil v. Juxon*, 1 Atk. 278; *Molony v. Kennedy*, 10 Sim.

Ch. XI. s. 1.

Revives on subsequent marriage.

Ceases on the termination of coverture.

Might be confined to particular coverture.

When a married woman entitled to property for her separate use becomes discoverd and marries again, the separate use, as a general rule, revives upon the subsequent marriage (*y*). And a gift to an unmarried woman for her separate use effectually constitutes a separate use during coverture (*z*). During widowhood, the separate use comes to an end, and with it the restraint upon anticipation, if it exists; a widow can, accordingly, even when restrained from anticipation, call for a transfer to herself of the trust funds (*a*).

The separate use may be confined to a particular coverture (*b*), but a distinct indication of such intention must be discovered in the instrument creating the separate use. Thus, where, after a gift to a married woman for life for her separate use without power of anticipation, the unnecessary words were added "free from the debts, &c. of the then intended husband," it was settled that this reference to a particular husband was insufficient to confine the separate use to the period of union with him (*c*).

An existing or intended coverture might also have been excluded; as in *King v. Lucas* (*d*), where, by a post-nuptial settlement, policies on the life of the husband were assigned to trustees upon trust to receive the money, invest it in specified securities, and pay the income to the wife during her life for her separate use independently of any future husband whom she might marry. It was held by the Court of Appeal, reversing the decision of Kay, J., that the trust for the separate use did not arise till after the death of the husband, and that the property was therefore not available for the payment of a liability contracted during her first coverture.

Where property given to the separate use of the wife fell

254. The contrary was formerly held at law; but it seems clear that the cases of *Tugman v. Hopkins*, 4 Man. & Gr. 389, and *Carne v. Brice*, 7 Mee. & W. 183, would have been decided differently in equity.

(*y*) *Re Gaffee*, 1 Mac. & G. 541; *Hawkes v. Hubback*, L. R., 11 Eq. 5.

(*z*) *Anderson v. Anderson*, 2 Myl. & K. 427; *Tullett v. Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 377; *New-*

lands v. Paynter, 4 My. & Cr. 408.

(*a*) *Buttanshaw v. Martin*, Johns. 89.

(*b*) *Moore v. Morris*, 4 Drew. 33.

(*c*) *Re Gaffee*, *ubi supra*, overruling *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, 6 Sim. 126; *Bradley v. Hughes*, 8 Sim. 149; and see *Hawkes v. Hubback*, L. R., 11 Eq. 5.

(*d*) 23 Ch. D. 712.

under the power of the husband, equity did not permit him to destroy her rights. Thus, if a trustee, without the express authority or implied consent of the wife, paid the *corpus* or the income of separate property to the husband, equity converted the husband himself into a trustee for her (e). Or if there happened to be no trustee for the wife, so that the legal ownership vested consequently in the husband, under his marital right, equity treated him as a trustee for his wife; as in *Bennett v. Davis* (f), where a father having made a devise of land in fee to his daughter, a married woman, for her separate use, without appointing any trustees, Sir Joseph Jekyll determined, that the husband, who would otherwise have been entitled to take the profits in his own right during the coverture, should be "debarred and made a trustee for his wife."

Ch. XI. s. 1.

Equity made the husband a trustee for his wife.

In *Newlands v. Paynter* (g), a testator bequeathed leaseholds and furniture, without the intervention of a trustee, to the separate use of his daughter, whom he appointed his sole executrix. She afterwards married without any settlement of the property in question. Sir Lancelot Shadwell held that her husband was trustee of it, and, consequently, that it was not liable to execution for his debts. In such a case, his creditors could not seize the property; for although given to the wife, without the intervention of a trustee, the legal right of the husband was subject to a trust in equity for the preservation of the separate use, and he took the property as he found it (h).

The nomination of trustees therefore not necessary.

It was therefore not actually necessary, though desirable in every case, that when the separate use was constituted by an instrument, trustees should be appointed thereby.

This right of the wife to the preservation for her own use of her separate property was held to fail as against third parties, who had been purchasers from the husband for valuable consideration without notice of the wife's interest, and had obtained

Where third parties have no notice of the trust.

(e) *Rich v. Cockell*, 9 Ves. 369, 375.
See also *Izod v. Lamb*, 1 Cr. & J. 35; *Gardner v. Gardner*, 1 Giff. 126; *Archer v. Rorke*, 7 Ir. Eq. Rep. 478; *Green v. Carlill*, 4 Ch. D. 882.

(f) 2 P. Wms. 316. Conf. *Darkin v. Darkin*, 17 Beav. 578.

(g) 10 Sim. 377; 4 Myl. & Cr. 408.

(h) See also *Duncan v. Cashin*, L. R., 10 C. P. 554.

Ch. XI. s. 1. the legal estate in, or legal possession of, the property from the husband (i). In such a case, the remedy of the wife was against the husband.

The Common Law Courts would protect the separate use.

Even at common law the separate use might be protected. It would seem, however, that formerly this could only have been effected by the interposition of a trustee holding the legal estate, for in such a case, the Common Law Courts, following their own maxims, regarded the trustee as owner of the property, so as to save it from execution for the husband's debts (k).

But after the Judicature Act, 1873, this equity was enforceable for the protection of the wife's separate property, whether the property were vested in a trustee for the wife, or in the wife herself, in all cases in which the property would in equity have been held property of the wife, and not of the husband (l).

Might be established by parol.

The question whether the separate use could be established by parol, was a point which, it is believed, was not settled by decision (m). If the husband, before marriage, agreed that his wife should hold certain property to her separate use, such agreement, to be binding, should have been in writing, and signed as required by the Statute of Frauds (n). But if, during the coverture, either the husband or a stranger should have thought fit to dedicate a sum of money to the separate use of a married woman, there seems no reason why this might not have been effectually done by parol. The Statute of Frauds, it is conceived, would not apply to such a case.

Separate property under the Act of 1870.

Except in the manner before mentioned, a married woman was, prior to 1870, incapable of acquiring separate property. In that year the first step was taken by the Married Women's

(i) *Dawson v. Prince*, 2 De G. & Jo. 41; *Parker v. Brooke*, 9 Ves. 583. In this case, however, a purchaser was fixed with notice.

(k) The Courts of Common Law, previously to the Judicature Act, refused to recognize the trusteeship of the husband, and regarded the separate chattels of the wife as liable to execution for his debts. *Izod v.*

Lamb, 1 Cr. & J. 35.

(l) As to the effect given by Courts of law to equitable claims in cases under the Interpleader Act, see *Duncan v. Cashin*, L. R., 10 C. P. 554.

(m) See *Simmons v. Simmons*, 6 Hare, 352, where the point is touched upon by V.-C. Wigram.

(n) *Dye v. Dye*, 13 Q. B. D. 147.

Property Act, 1870 (*o*), towards enabling a married woman to acquire and hold property as her separate property. This Act came into operation on the 9th August, 1870, and enabled every married woman to acquire separate property by her own industry and exertions in any employment carried on separately from her husband; to make deposits in savings banks and investments in her own name as her separate property, and to effect an insurance on her own life or on that of her husband for her separate use. Any woman married after the passing of this Act took also as her separate property the rents and profits of any real estate and all personal property devolving upon her as heiress or next of kin of an intestate. Ch. XI. s. 1.

This partial measure remained in force until the 31st December, 1882. In that year the Married Women's Property Act, 1882 (*p*), was passed. It came into operation on the 1st January, 1883. Separate property under the Act of 1882. It has affected not only the property of married women, but has made a complete change in their *status*. This latter subject is discussed elsewhere; but, with regard to property, the alterations effected may, perhaps, be thus summed up: that by this Act not only were all the powers and incidents of separate property created by the Courts of Equity, attached in the case of every woman married on or after the 1st January, 1883, to all her property real and personal, and, in the case of every woman married before that date, to all property the title to which has accrued after that date, but every woman has been enabled since the 1st January, 1883, subject to the above-mentioned limitation in the case of marriages contracted before that date, to acquire, to hold, and dispose of by will or otherwise, any real or personal property as her separate property, and to contract in respect of it, as if she were a *feme sole* (*q*).

Every woman married on or after the 1st January, 1883, is entitled to have and to hold as her separate property and to dispose of in manner aforesaid (*r*) all real and personal property which shall belong to her at the time of marriage, or shall be Property of a woman married after the Act to be held by her as a *feme sole*.

(*o*) 33 & 34 Vict. c. 93. See the Act in the Appendix. This Act was repealed by the Act of 1882; but was in force from the 9th August, 1870, to the 31st December, 1882.
 (*p*) 45 & 46 Vict. c. 75.
 (*q*) *Ibid.* s. 1.
 (*r*) *Ibid.*

Ch. XI. s. 1. acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband, or by the exercise of literary, artistic or scientific skill (s).

Property
acquired after
the Act by a
woman mar-
ried before
the Act.

Every woman married before the 1st January, 1883, is entitled to have and to hold and to dispose of in manner aforesaid (t) as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue on or after that date, including any wages, earnings, money and property gained or acquired by her, as above mentioned, in the case of a woman married on or after the 1st January, 1883 (u).

After these general provisions, which confer upon a married woman the fullest power of entering into contracts, and of holding and disposing of property as if she were an unmarried woman, the Act enters into certain details regarding particular contracts.

It proceeds in several sections (v) to enact certain provisions with reference to investments and policies of assurance, of which the greater part would seem to follow necessarily from the capacity and rights and powers conferred upon a married woman by the general enactments of the earlier sections. These sections appear to have been adapted from the similar provisions in the Act of 1870 without sufficient consideration having been given to the fact, that the Act of 1882 in its scope and results is essentially different from the Act of 1870.

Investments
in the name of
a married
woman at the
date of the
Act.

All deposits, annuities and sums forming part of the public funds, and all other investments standing in the sole name of a married woman on the 1st January, 1883, are to be deemed, unless and until the contrary shall be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, &c., is standing in the sole name of a married woman shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to

(s) 45 & 46 Vict. c. 75, s. 2.

(t) *Ibid.* See sect. 1.

(u) *Ibid.* s. 5.

(v) *Ibid.* ss. 6—11.

empower her to deal with the same and receive the dividends and interest thereof without the concurrence of her husband (x). Ch. XI. s. 1.

Any deposits, annuities or other investments placed or made to stand in the sole name of a married woman after the 1st January, 1883, are, unless and until the contrary be shown, her separate property, and her separate estate alone is liable for any liability incident thereto. No corporation or company, however, is bound to admit a married woman to be a holder of any shares or stock to which a liability may be incident contrary to the provisions of their constitution (y). There is no doubt that under this provision a married woman may invest in her own name in any kind of investment, however large may be the liability which she may incur thereby, for calls or otherwise, and that her husband is relieved from all liability in respect of her investments. Investments of a married woman after the date of the Act.

All these provisions are, so far as relates to the interest of a married woman therein, specifically extended to any deposits, annuities and investments standing on the 1st January, 1883, or at any time afterwards placed or made to stand in the name of any married woman jointly with any persons or person other than her husband (z); and it is not necessary for the husband of any married woman in respect of her interest to join in the transfer of any annuity, deposit or investment, whether standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband (a). Investments in the joint names of a married woman and persons other than her husband.

As a complete separate existence, and capacity of holding and dealing with property, had been given to a married woman, and the inability of the wife to act independently, and of the husband to make a gift or transfer of property directly to his wife had been abolished, it became necessary to guard against fraud being committed—on the one hand, on the part of the wife, by fraudulent investment of her husband's moneys in her own name, and on the other hand, on the part of the husband, by gifts by him to the wife in fraud of creditors. Accordingly, if any invest- Provisions against fraud.

(x) *Ibid.* s. 6.

(z) *Ibid.* s. 8.

(y) *Ibid.* s. 7.

(a) *Ibid.* s. 9.

Ch. XI. s. 1. ments be made by a married woman by means of moneys of her husband without his consent, the Court may order such investment or any part thereof to be transferred to the husband; and nothing in the Act contained gives validity, as against creditors of the husband, to any gift, by a husband to his wife, of any property which after such gift shall continue in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of the wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if the Act had not passed (*b*).

Policies of
assurance.

Another species of separate property which can now be acquired by a married woman is that of policies of assurance.

Act of 1870.

The right of a married woman to effect a policy of assurance was first given by the Married Women's Property Act, 1870 (*c*); but what was given by that Act was only a statutory power, and the power was limited to enabling a married woman to effect a policy upon her own life or the life of her husband for her separate use.

Act of 1882.

Under the Married Women's Property Act, 1882 (*d*), the right to effect a policy of assurance is specifically based upon the general power of a married woman to make contracts; and the words of the section seem intended to emphasize the complete independent status and capacity given by the Act to married women; for it is enacted that—

Sect. 11.

“A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life, or the life of her husband, for her separate use; and the same and all benefit thereof shall enure accordingly.

“A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts.

(*b*) 45 & 46 Vict. c. 75, s. 10.

(*d*) 45 & 46 Vict. c. 75, s. 11.

(*c*) 33 & 34 Vict. c. 93, s. 10.

Provided that if it shall be proved that the policy was effected, and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy, a sum equal to the premiums so paid.” Ch. XI. s. 1.

The right to enter into a contract of assurance would without express enactment have been conferred by the general power of entering into contracts given by the 1st section of the Act; so that it would seem that the words “by virtue of the power of making contracts hereinbefore contained” are unnecessary.

The following propositions state the effect of the section:— Effect of the section.

1. A policy effected by a married woman on her own life will be her separate property, form part of her estate, and be subject to her debts.

2. A policy effected by a married woman on the life of her husband must, in order to render it her property, be effected on his life for her separate use, and if so effected will be her separate property, form part of her estate, and be subject to her debts.

3. A policy intended to be for the benefit of the husband, or of the children of any woman, or of both, or either, must be effected by her on her own life, and be expressed in the policy to be effected for the benefit of the objects intended, and if so effected will create a trust for the objects named in the policy; and so long as any object of the trust exists, the policy does not form part of her separate estate, and is not subject to her debts.

4. Similarly, a policy effected by a man on his own life, and expressed in the policy to be effected for the benefit of his wife or children, or both or either, will enure for their benefit, and not form part of his estate or be subject to his debts.

5. A policy effected by a man on his own life, and expressed to be for the benefit of his wife, or of his wife and children, will, to the extent of the interest taken by the wife, form part of her estate, whether she survive her husband or not, and be assets for the payment of her debts.

6. Similarly, a policy effected by a woman on her own life, and expressed to be for the benefit of her husband, or of her husband and children, will, to the extent of the interest taken by

Ch. XI. s. 1. the husband, form part of his estate, whether he survive his wife or not, and be assets for the payment of his debts.

In no case where the policy moneys are settled by the Act, can the insured affect such moneys by act *inter viros* or by will.

Assurance and
payment of
premiums in
fraud of
creditors.

In either of the cases where a policy is effected by the husband for the benefit of his wife and children, or either, or by the wife for the benefit of her husband and children, or either, if it be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they are entitled to receive out of the policy moneys a sum equal to the premiums so paid. Two conditions must co-exist to entitle the creditors to recover the premiums paid; namely, that the policy has been effected *and* the premiums paid with intent to defraud creditors. If it be proved that the policy has been effected with intent to defraud creditors, it will follow almost as a matter of course that the premiums paid on a policy effected with that intent, if paid by the insured, have also been paid in fraud of creditors; but if it fail to be proved that the policy was effected with that intent, it appears impossible to allege that premiums paid by the insured have been paid with intent to defraud creditors.

If the premiums have been paid by some person other than the insured, it would seem that they cannot, in any event, be said to have been paid in fraud of creditors, and that in that case the creditors will not be entitled to such premiums; and that, even if the insured has paid the premiums, the intent to defraud must be proved (*e*).

Construction
of the words
"for the
benefit of the
wife and chil-
dren."

If the interests to be taken by the wife and children in the moneys payable under the policy are not expressed upon the policy further than by the words "for the benefit of the wife and children," these words will be construed as giving the wife a life interest in the fund with remainder to the children (*f*).

This case was decided on the 18th section of the Act of 1870;

(*e*) Conf. *Holt v. Everall*, 2 Ch. D. 266.

(*f*) *Re Adam's Policy Trusts*, 23 Ch. D. 525. The decision in *Re*

Mellor's Policy Trusts, 6 Ch. D. 127, is inexplicable, and that in the same case in 7 Ch. D. 200, cannot be supported.

but Chitty, J., in considering the 11th section of the Act of Ch. XI. s. 1. 1882, said :—

“It treats the interest of the wife and the interest of the children as two distinct things. That is an indication, though a slight one, that the Legislature never intended the wife and children to take concurrently, but that they should take separate interests: in other words the wife and children do not take together, or the survivors of them, but the wife is spoken of separately from the children” (g).

If, previously to the passing of this Act, a married man, being insolvent and a trader, had effected a policy on his life, and either by the same or a separate instrument had declared a trust for the separate use of his wife, that would have been a settlement of property within the 91st section of the Bankruptcy Act, 1869 (h); but, it would seem, that where a policy is effected under this Act (i), it is not within the provisions of sect. 47 of the Bankruptcy Act, 1883 (k), which avoids voluntary settlements, and replaces sect. 91 of the Bankruptcy Act, 1869; and that, even in the case of a policy effected in fraud of creditors, they are only entitled to receive out of the moneys payable under the policy, when paid, a sum equal to the premiums paid, and that the surplus, if any, will belong to the insurer.

Proceeds of policy not affected by subsequent bankruptcy.

In the case of *Holt v. Everall* (l), which was a case upon a similar provision in the Married Women's Property Act, 1870, a trader insured his life in April, 1870. In April, 1871, the policies were surrendered, and two new policies at the same premiums and for the same sums were issued, payable to the separate use of his wife if she survived him, and to him if he survived her. In January, 1873, the husband presented a petition for liquidation. In June, 1873, he died. Holt, the trustee in the liquidation, claimed to be entitled, as against the widow, to the moneys payable under the policies, on the grounds that the bankrupt, being a trader, and having become bankrupt within two years from the date of the policies of 1871, the policies were affected by the 91st section of the Bankruptcy

Holt v. Everall.

(g) *Re Adam's Policy Trusts*, 23 Ch. D. 529.

(h) *Holt v. Everall*, 2 Ch. D. 266.

(i) 45 & 46 Vict. c. 75.

(k) 46 & 47 Vict. c. 52. There is now no distinction in this respect between traders and non-traders.

(l) 2 Ch. D. 266.

Ch. XI. s. 1. Act of 1869, by which any settlement of property made by a trader upon his wife and children is void as against the trustee in bankruptcy if he becomes a bankrupt within two years from the date of the settlement of the property, and also that they were a settlement of the then existing property of the bankrupt. It was held, however, that the new policies were in terms within the 10th section of the Married Women's Property Act, and not within the 91st section of the Bankruptcy Act, 1869; that they were not settled property within that section; that there was nothing substantial arising from the fact of the exchange of the old policies for the new policies: for the old policies, being of no value, there was nothing taken away from the creditors; and that the widow was entitled to the moneys payable under them.

If, in a transaction of a similar kind, any actual property or value were given up as part of the consideration for the issue of new policies, the question would arise, what was the real substance of the transaction, whether, being within the words of the Married Women's Property Act, and not within the words of the Bankruptcy Act, it was not a device to avoid the provisions of that Act, and void as a fraud upon the legislature. But, in the case of *Holt v. Everall (m)*, the policies given up were of no value. It was also proved in that case that the premiums had been paid out of the wife's separate property, and, accordingly, the provision at the end of the 10th section of the Married Women's Property Act, 1870, did not apply; and the trustee in liquidation was not entitled to receive out of the insurance moneys the amount of the premiums paid.

Trustee of
policy moneys.

A trustee of the moneys payable under the policy may be appointed by the insured in the policy, or by an independent instrument or memorandum, and provision may be in like manner made for the investment of the moneys. If no trustee be appointed, the policy, on being effected, vests in the insured and his or her legal personal representatives in trust for the objects named in the policy (*n*).

If at the death of the insured, or at any time afterwards, there

(*m*) 2 Ch. D. 266.

(*n*) 45 & 46 Vict. c. 75, s. 11.

is no trustee, a trustee may be appointed by any Court having jurisdiction under the Trustee Acts (*o*). Ch. XI. s. 1.

It was held, that where a policy had been effected under the Act of 1870, and became payable in 1883, a petition for the appointment of a trustee must be entitled in the matter of the Act of 1882, for that the Act of 1870 having been repealed by the Act of 1882, the 10th section of the Act of 1870 did not remain in force for any purpose, notwithstanding the saving clause of the 22nd section of the Act of 1882 (*p*).

The receipt of the trustee, or, if no notice be given to the insurance office of his appointment, the receipt of the legal personal representative of the insured, is a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part. Receipt by trustee.

(*o*) *Ibid.* s. 11. The Trustee Vict. c. 55.
 Act and Acts extending the same (*p*) *Re Soutar's Policy Trusts*, 26
 are 13 & 14 Vict. c. 60; 15 & 16 Ch. D. 236.

SECTION II.

SEPARATE PROPERTY—THE WIFE'S POWER OF DISPOSITION.

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Her power of disposition over her separate property.

"PROPERTY," said Lord Thurlow, in *Fettiplace v. Gorges* (a), "the moment it can be enjoyed, must be enjoyed with all its incidents" (b). Therefore, when married women were allowed to enjoy property independently of their husbands, the privilege necessarily implied a *jus disponendi*. Accordingly, it was said

(a) 1 Ves. jun. at p. 49.

(b) This dictum of Lord Thurlow's was applied by him only to personal

property; but there seems no reason to limit its application.

that a wife might dispose of her separate property, as if she were sole. Ch. XI. s. 2.

Formerly, a married woman entitled to separate property or income unfettered by any restraint on anticipation could, in equity, bind it and render it liable to her debts, both during coverture and after the coverture had ceased (*c*). She could, in equity, validly dispose of any and all her separate property, whether chattels personal in possession, reversionary interests in chattels real (*d*), reversionary choses in action, or real estate in possession (*e*) or in remainder (*f*).

There was, at one time, some doubt whether a married woman, entitled to an equitable estate in fee for her separate use, could convey the same, otherwise than by deed duly executed and acknowledged in conformity with the provisions of the Fines and Recoveries Act (*g*), so as to bind the heir. But this was settled by the decision in *Taylor v. Meads* (*h*), where Lord Westbury said:— Separate real estate.
Taylor v. Meads.

“With respect to separate property, the *feme covert* is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation. . . . It would be contrary to the whole principle of the doctrine of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife’s separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. . . . I must hold, therefore, that a *feme covert*, where not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation over that property, by instrument *inter vivos* or by will.”

This power of disposition did not extend to the legal estate, which was not affected by the equitable doctrine of the separate use. In order, therefore, to pass the legal estate, the concurrence of the trustees in whom it was vested was necessary; and where there were no trustees, and the legal estate conse- Power of disposition did not extend to legal estate.

(*c*) *Johnson v. Gallagher*, 3 D., F. & J. 494.

(*d*) *Major v. Lansley*, 2 Russ. & M. 355; *Donne v. Hart*, 2 Russ. & M. 360. See also *Sturgis v. Corp.*, 13 Ves. 190.

(*e*) *Taylor v. Meads*, 4 De G., J. & S. 597; *Cooper v. Macdonald*, 7 Ch. D. 288.

(*f*) *Pride v. Bubb*, L. R., 7 Ch. 64.

(*g*) 3 & 4 Will. 4, c. 74.

(*h*) 4 De G., J. & S. at pp. 604, 607.

Ch. XI. s. 2. quently vested in the husband, the provisions of the Fines and Recoveries Act had to be complied with. But it would probably be held that if the wife disposed of her equitable fee, the purchaser might call for a conveyance of the legal estate.

Formerly it was held at law, where equitable principles were disregarded, that a married woman could not, except in exercise of a power, devise real estate limited to her in fee for her separate use, although such a devise would have been held perfectly valid in equity. But the Judicature Act, 1873 (i), by uniting all the Courts, and enacting that in cases of conflict or variance the rules of equity should prevail over those of the common law, abolished this distinction; and, accordingly, such a devise would be held valid in any Court.

She might bestow her separate property on her husband.

As the wife was in equity considered a *feme sole* with reference to her separate property, she might, of course, make a present of it to her husband (k), although at law there was, in general, no such thing known as a *donatio inter virum et uxorem*.

Her examination and consent in Court not necessary.

The wife's examination and consent in Court was entirely unnecessary with reference to her separate property. But where it was a fund in Court, it would not be paid to the husband, unless her consent had been taken in Court (l).

Power of disposition now conferred by statute.

This free and uncontrolled power of disposition of her separate property as if she were a *feme sole*, formerly created and bestowed upon a married woman by the Courts of Equity, is now by statute (m) given to every woman married after the 1st January, 1883, over all her property, of any description, at any time, and however acquired, unless a restraint on anticipation be attached thereto; and to every woman married before the 1st January, 1883, over all her property, the title to which has accrued on or after that date, and which she is not restrained from anticipating.

The following propositions are, it is conceived, as much law now as prior to the passing of the Act of 1882:—

(i) 36 & 37 Vict. c. 66, s. 25 (11).

(l) *Milnes v. Busk*, 2 Ves. jun.

(k) A married woman having a fund settled to her separate use may assign it to her husband. *Lynn v. Ashton*, 1 Russ. & M. 188, 190; *Gardner v. Gardner*, 1 Giff. 126.

488; *Wordsworth v. Dayrell*, 4 W. R. 689.

(m) 45 & 46 Vict. c. 75, s. 1 (1), 5.

When the wife has made a gift to her husband, she will be precluded after his death from making any claim against his estate in respect of what he so received (*n*). Ch. XI. s. 2.

If the wife allow her husband to receive her separate income, and he apply it to the use of the family, she will be presumed to have assented to this arrangement (*o*); and it may be laid down that in such a case, if the wife do not make a claim to her separate income, she will, in general, and unless there be circumstances suggesting an opposite construction, be held to have assented to and acquiesced in the receipt of it by her husband (*p*); the rule being, that separate property of the wife paid to the husband, with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other, cannot be recalled (*q*).

When husband applies the separate property to the use of the family.

When she allows him to take it and makes no claim.

If the circumstances do not warrant the inference that the wife has assented to, or acquiesced in, the husband's receiving her income, or in his mode of applying it, she will be entitled to reimbursement out of his estate (*r*).

When she will be entitled to reimbursement from his estate.

In directing an account of the wife's separate estate against her husband, consideration will be given to any extra expenses which he may have incurred for her maintenance; as in *Attorney-General v. Parnter* (*s*), where the husband was subjected to outlays distinct from ordinary family expenditure, by reason of his wife being insane. The Court does not proceed on the principle which governs its discretion in the case of an infant, whose father is never allowed for maintenance, unless he appear not to be of ability (*t*).

In directing an account against husband his extra expenses will be considered.

(*n*) *Pawlet v. Delaval*, 2 Ves. sen. 663; *Milner v. Busk*, 2 Ves. jun. 488; *Bartlett v. Gillard*, 3 Russ. 149; see also *Caton v. Rideout*, 1 Mac. & G. 599.

Dixon, 9 Ch. D. 587.

(*q*) *Caton v. Rideout*, 1 Mac. & G. 599.

(*o*) *Squire v. Dean*, 4 Bro. C. C. 326; *Carter v. Anderson*, 3 Sim. 370; *Rowley v. Unwin*, 2 K. & J. 138; *Corbally v. Grainger*, 4 Ir. Ch. Rep. 173; *Payne v. Little*, 28 Beav. 1.

(*r*) *Parker v. Brooke*, 9 Ves. 583. It was insisted in this case that the husband, having received property settled to the separate use of his wife, must account for it. Sir W. Grant said, "There could be no doubt in giving the account."

(*p*) *Beresford v. Archbishop of Armagh*, 13 Sim. 643; *Caton v. Rideout*, 1 M. & G. 599; *Dixon v.*

Darkin v. Darkin, 17 Beav. 578.

(*s*) 4 Bro. 408.

(*t*) *Brodie v. Barry*, 2 Ves. & B. 36.

Chap. XI. s. 2.

Where a wife was in an asylum, and her husband was unable to maintain her there, the Court ordered that the surplus income of her separate property should be paid to him; but refused to apply any part of the principal fund to reimburse him in respect of what he had actually paid for her past maintenance (*u*). Where a stranger advanced moneys to provide necessaries for the support of a married woman living separate from her husband, it was held that he was entitled to repayment after her death out of her separate estate, and, the funds being held in trust for her, that the debt was not barred by the Statute of Limitations (*x*).

How far the account will be carried back.

Where the husband had received advances from the trustees of the wife's separate property, and where she had lived with him till he died, on a bill filed by her against the trustees, it was held by Sir W. Grant that the account ought not to be carried back beyond the period of his death (*y*). The savings of the wife not given by her to the husband may be followed if invested in his name (*z*).

Satisfaction of wife's claim on her debtor by his payments to her husband.

The wife may authorize her husband to receive her separate income from the party bound to pay it; and this will satisfy the demand; or she may produce the same effect by tacit and implied acquiescence. Thus, in *Bartlett v. Gillard* (*a*), an annuity given to the separate use of a married woman was held to be discharged by payments made to the use of the husband, and sums allowed him on account; the circumstances being such as to satisfy the Court, that the mode of dealing between the person who was bound to pay the annuity and the husband was with the acquiescence of the wife, or with her authority express or implied.

In *Carter v. Anderson* (*b*) this doctrine was carried still further; for there a married woman was entitled to an annuity of 500*l.* for her separate use, charged on an estate not belonging to her

(*u*) *Re Spiller*, 6 Jur., N. S. 386;
Re Baker's Trusts, L. R., 13 Eq.
168; *Edwards v. Abrey*, 2 Phil. 37.

(*x*) *Hodgson v. Williamson*, 15
Ch. D. 87, but *quære*.

(*y*) *Dalbiac v. Dalbiac*, 16 Ves.
116.

(*z*) *Darkin v. Darkin*, 17 Beav.
578; see *Rowe v. Rowe*, 2 De G. &
Sm. 294; *Barrack v. M'Culloch*, 3
K. & J. 110; *Scales v. Baker*, 28
Beav. 91.

(*a*) 3 Russ. 149.

(*b*) 3 Sim. 370.

husband, but of which he was, under a power of attorney, in receipt of the rents. It appeared that for several years she had made no demand upon the owner of the estate; while, on the other hand, her husband became his debtor in respect of the rents received by him, and was declared a bankrupt. She then instituted a suit against the owner, claiming arrears accrued during the period while her husband had received the rents; but was met by the objection that she had already, through her husband, received the income, and enjoyed it, and therefore was not entitled to demand it over again. Sir Lancelot Shadwell held, that as she had resided with her husband all the time, as she had had the benefit of his expenditure, as she knew that he was in receipt of the rents, and as she had made no claim on the owner until after her husband's bankruptcy, she was, under all the circumstances, precluded from enforcing her demand (c).

Even before the Act of 1882, a married woman, so far as her separate property, when unfettered by any restraint on anticipation, was concerned, might make contracts respecting it, and those contracts, if valid, would bind it, or, if invalid, would be set aside precisely on the same principles which prevailed in cases where the contracting parties on both sides were free from disabilities (d). It was said in *The London Chartered Bank of Australia v. Lemprière* (e), that, given the relation of debtor and creditor, in equity all the consequences of such relation would appear to follow, just as if there were no coverture in the case. But no personal liability in respect of such contracts or engagements was incurred by a married woman, and no judgment could be recovered against her personally (f). The power of contracting possessed by her was not a power of entering into a personal contract, but a power of contracting so as to bind her separate property.

(c) See *Dixon v. Dixon*, 9 Ch. D. 587.

(d) *M'Henry v. Davies*, L. R., 10 Eq. 88; see also *Latouche v. Latouche*, 34 L. J., Ex. 85. As to the liability of the wife's separate estate for calls on shares, see *In re Leeds Banking Company*, L. R., 3 Eq. 781;

Butler v. Cumpston, L. R., 7 Eq. 16; *Warne v. Routledge*, L. R., 18 Eq. 497; *Wainford v. Heyl*, L. R., 20 Eq. 321.

(e) L. R., 4 P. C. 572, 596.

(f) *Davis v. Ballenden*, 46 L. T. 797; *Bursill v. Tanner*, 32 W. R. 827.

Chap. XI. s. 2. property (g). Her *person* was not liable, and the relation of debtor and creditor existed only in this sense, that the creditor could obtain a judgment against the separate property, and obtain payment out of it. The contracting a debt by a married woman having separate property, did not prevent her disposing of that separate property, any more than the contracting a debt prevented a man from disposing of any part of his property; and therefore, as a man might alienate his property until it was bound by execution, so a married woman having separate property would not be restrained at the suit of a creditor from alienating that property until it was bound by judgment (h). And further, the power of contracting possessed by a married woman having separate property was merely a power to contract a debt to be paid out of that separate property, and not in respect of any separate property which she might acquire after the date of the contract; but in cases governed by the Married Women's Property Act, 1882, this limitation has been abolished, and the power of contracting has also been placed on a wider basis (i).

A married woman has also the same power over the savings out of her separate property, as over the separate property itself (k).

This power over her savings, which was established by the Courts of Equity, was specially recognized by the Act of 1870, and necessarily follows from the provisions of the Act of 1882.

When separate property bound by general engagements.

After some conflicting decisions, it was finally settled that not only the bonds, bills and promissory notes, but also the general engagements of a married woman, whether in writing or verbal (except, of course, as to the latter, in cases coming within

(g) *Wainford v. Heyl*, L. R., 20 Eq. 321; *Warne v. Routledge*, L. R., 18 Eq. 497; *M'Henry v. Davies*, L. R., 10 Eq. 88. See also *Latouche v. Latouche*, 34 L. J., Ex. 85; *Re Leeds Banking Company*, L. R., 3 Eq. 781; *Butler v. Cumpston*, L. R., 7 Eq. 16.

(h) *Wainford v. Heyl*, L. R., 20 Eq. 321; *Robinson v. Pickering*, 16

Ch. D. 660; *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Johnson v. Gallagher*, 3 De G., F. & Jo. 494.

(i) See as to the power of contracting under the Married Women's Property Act, 1882, *post*, chapter on Recent Legislation.

(k) *Muggeridge v. Stanton*, 1 De G., F. & Jo. 107; *Butler v. Cumpston*, L. R., 7 Eq. 16.

the Statute of Frauds) (*l*), would affect her separate property; Chap. XI. s. 2. but, in order to bind the separate property, it should appear that the general engagement was made with reference to and upon the faith or credit of that property (*m*), or, from the nature of the contract, must have been intended to be so referred (*n*); and whether this was so or not was a question for the judgment of the Court upon all the circumstances of the case; but she was not liable for general contracts, which from their nature could not be referred to her separate property.

It was also ultimately settled that the general engagements of a married woman, contracted on the credit of her separate property, were not in the nature of appointments of or charges on her separate property, but constituted only the relation of debtor and creditor, with a right for the creditor to go against the particular fund (*o*).

Questions formerly arose, as to whether the general engagements of a married woman affected the *corpus* of property, where the married woman had a life interest with a general power of appointment, followed by a gift over in default of appointment. The cases were twofold—(1) where the power had been exercised; and (2) where it had not been exercised. A limitation to a married woman for her separate use, without any restraint on anticipation, followed by a general power of appointment by deed or will, with a limitation in default of appointment to her executors and administrators, was held to vest the entire *corpus* in her for all purposes, as fully as a similar limitation to a man would vest it in him (*p*); and in such a case, whether the power were exercised or not, the *corpus* of the property was, and, of course, still is, liable to satisfy the debts and general engagements of a married woman.

When *corpus* bound where wife had life interest followed by power of appointment.

The result has been decided to be the same, where the power

(*l*) 29 Car. 2, c. 3; *Burke v. Tuiste*, 10 Ir. Ch. Rep. 467.

(*m*) *Johnson v. Gallagher*, 3 De G., F. & Jo. 494.

(*n*) *Wainford v. Heyl*, L. R., 20 Eq. 321, 324. See *Warne v. Routledge*, L. R., 18 Eq. 497.

(*o*) Per James, L. J., in *Robinson v. Pickering*, 16 Ch. D. at p. 663; *Owens v. Dickinson*, Cr. & Ph. 48; *National Provincial Bank v. Thomas*, 24 W. R. 1013.

(*p*) See *The London Chartered Bank of Australia v. Lemprière*, L. R., 4 P. C. 572, 595.

Chap. XI. s. 2. of appointment was by deed or will, followed by a gift over in default of appointment, and the power was exercised by will (*g*).

But before the Act of 1882, where the power of appointment was by will only, and the power had been exercised, the decisions were conflicting as to whether the *corpus* of the property affected by the exercise of the general power was rendered separate property, so as to be liable to the claims of creditors (*r*).

Effect of the
Act of 1882.

The doubt, however, has been settled by the 4th section of the Married Women's Property Act, 1882, which provides that the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act (*s*); so that now in both these cases the exercise of the power by a married woman has the same effect as the exercise of a similar power by a man.

In cases in which the power of appointment is followed by a gift over in default of appointment, then, whether the power be by deed or will, or by will only, and the power is not exercised, the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment (*t*).

In all cases occurring after 31st December, 1882, the questions as to general engagements above discussed cannot arise, as it is provided by the Act of 1882 that every contract entered into by a married woman shall be deemed to be a contract entered into with respect to and to bind her separate property, unless the contrary be shown.

A contract binding on the separate property of a married woman was not, of course, terminated by the death of her husband, but the creditor's remedy was not, in the absence of

(*g*) *Heatley v. Thomas*, 15 Ves. 596; *The London Chartered Bank of Australia v. Lemprière*, L. R., 4 P. C. 572.

(*r*) *Allen v. Papworth*, 1 Ves. sen. 163; *Hulme v. Tenant*, 1 Bro. C. C. 15; *Socket v. Wray*, 4 Bro. C. C. 483; *Heatley v. Thomas*, 15 Ves. 596; *Hughes v. Wells*, 9 Hare, 749; *Vaughan v. Vanderstegen*, 2

Drew. 165; *Johnson v. Gallagher*, 3 De G., F. & J. 494; *London Chartered Bank v. Lemprière*, L. R., 4 P. C. 572; *Mayd v. Field*, 3 Ch. D. 587; *Godfrey v. Harben*, 13 Ch. D. 216; *Pike v. Fitzgibbon*, 17 Ch. D. 454, 466; *Hodges v. Hodges*, 20 Ch. D. 749.

(*s*) 45 & 46 Vict. c. 75, s. 4.

(*t*) *Nail v. Punter*, 5 Sim. 555.

a new contract, extended so as to give him a right of action Chap. XI. s. 2. against the wife personally.

In accordance with this principle, the case of *Stead v. Nelson* (*u*) was decided. There a husband and wife undertook for valuable consideration, by writing under their hands, to execute a mortgage of her separate estate. The husband died. Lord Langdale held that the surviving wife was bound by the agreement. During the coverture she had in equity the same power over the estate as she would have had if she had been a *feme sole*. She, therefore, had power to enter into this agreement, which his lordship held must be specifically performed.

Decree against widow upon an agreement made while under coverture.

In *Aylett v. Ashton* (*x*), Lord Cottenham (then Sir Charles C. Pepys, M. R.) said that, although a *feme covert* had power, and the Court had jurisdiction, over the rents and profits of her separate property, no case had given effect to her contracts against the *corpus* of her separate estate. This distinction, though suggested by Lord Thurlow (*y*), and apparently adopted by Lord Eldon (*z*), can only be explained by the circumstance that the separate use was in those days usually confined to the life interest of the wife; and that even if the fee simple were settled to her separate use, she was not, in the absence of an express power, considered to be capable of disposing of it, except to the same extent as if it were not separate property.

Upon the principle that a married woman can dispose of her separate estate, she will render it liable by concurring with her trustees in a breach of trust (*a*), unless she is restrained from anticipation (*b*).

Her liability for breach of trust.

(*u*) 2 Beav. 245.

(*x*) 1 Myl. & Cr. 105, at p. 112.

(*y*) *Hulme v. Tenant*, 1 Bro. C. C. 16.

(*z*) *Nantes v. Corrock*, 9 Ves. 182, 189.

(*a*) *Crosby v. Church*, 3 Beav. 485. See also *Brewer v. Swirles*, 2 Sm. & G. 219, and cases collected in 1

White & Tudor, L. C., 5th ed., p. 533.

(*b*) *Davies v. Hodgson*, 25 Beav. 177; *Clive v. Carew*, 1 J. & H. 199; *Robinson v. Wheelwright*, 6 De G., M. & G. 535; *Barrow v. Barrow*, 4 K. & J. 409; and as to arrears of income, see *Pemberton v. M'Gill*, 1 Dr. & Sm. 266.

SECTION III.

THE RESTRAINT UPON ANTICIPATION.

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Chap. XI. s. 3. The wife, as we have seen, has not only the privilege of enjoying, but the unrestrained freedom of alienating, her separate property.

Restraint
upon antici-
pation.

With a perfect liberty of disposal, this inconvenience arose: She was still open to the operation of her husband's personal influence; and might be persuaded to part with, or to charge, her separate property, even against her better judgment. Cases constantly occurred in which, yielding to his authority, or complying with his entreaties, she defeated the provision intended for her. Insomuch that the mere limiting of property in this manner proved often a futile operation; and the separate use was in danger, except where the wife had great firmness, of becoming little more than a name; until Lord

Thurlow, in *Miss Watson's case* (a), gave sanction to the salutary clause which restrains anticipation, and takes from the wife the power of bringing ruin upon herself. Chap. XI. s. 3.

By this clause, the separate use is not only made secure and indefeasible, but is further prevented from becoming (what it otherwise might be) the cause of matrimonial contention; for the husband knowing that his wife's hands are tied up, forbears to urge impossibilities. In every point of view, therefore, this clause deserves the commendation which the wise have bestowed upon it. And, though in form a fetter upon the wife, it is, in effect, of the greatest benefit to her. For, suppose a gift made to her separate use without prohibiting alienation; the Court in such a case has no jurisdiction to award a settlement. The husband, by exercising his marital influence, may prevail on her to renounce the separate use. He thus gets access to the whole of the property; and she will then be in a worse predicament than if the donor had bestowed it on her generally.

Its necessity as guard of the separate use.

Its useful working.

Though in form a fetter, in fact a benefit to the wife.

A restraint against anticipation may be imposed, whether the subject of the gift be real or personal property, and whether it consist of an estate in fee, or only for life (b).

The restraint applicable to all kinds of property.

Where a fund producing income—as, for example, a sum of consols—is given absolutely to a married woman, and the gift is accompanied by a restraint on anticipation, that restraint ties up the income of the fund, so as to prevent, during coverture, the alienation of the *corpus* (c). But if the gift consists of a sum of money, from which, of course, no income arises, the restraining clause may be rejected, and the money paid to the married woman on her separate receipt (d). The application of the one or the other of these rules to a residuary bequest depends upon the condition in which the property is found; thus, stock of the testator, being an income-producing fund, will not, but cash, not being such, will, under these circum-

Income-producing fund.

(a) See *Pybus v. Smith*, 3 Bro. 17 Eq. 409.

C. C. 340; *Jackson v. Hobhouse*, 2 Mer. 483, where Lord Eldon gives an account of the introduction of the clause against anticipation. (c) *Re Ellis' Trusts*, L. R., 17 Eq. 409; *Re Benton*, 19 Ch. D. 277.

(d) *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Taber's Estate*, 30 W. R. 883.

(b) *Baggett v. Meux*, 1 Phil. 627; 1 Coll. 138; *Re Ellis' Trusts*, L. R.,

Chap. XI. s. 3. stances, be paid to the married woman (e). If, however, it is the duty of the trustees to invest the trust funds, and pay the income to a married woman without power of anticipation, they cannot pay over to her during coverture a sum of cash which is uninvested in their hands (f). It seems that there is no power to restrain *alienation* as distinguished from *anticipation* (g).

Rule against
perpetuities.

Another instance in which the attempted restraint is ineffectual, is where the result of applying it would be to tie up the property beyond the limits allowed by the rule against perpetuities. Thus, where a power of appointment conferred by a marriage settlement was exercised, by limiting the share of a married daughter to trustees upon trust for her separate use for life, without power of anticipation, and after her decease to her appointees by deed or will, and in default to her executors or administrators, the restraint was rejected, and the appointment was upheld (h). And where there was a gift by will to a class, which might include persons not born in the lifetime of the testator, a general clause restraining anticipation has been held to be invalid (i). But, if the class has been ascertained by the death of the parent, or by the mother passing the age of child-bearing, before the instrument comes into operation, the restraint on anticipation will be valid (k).

In *Buckton v. Hay* (l), the late Master of the Rolls, Sir G. Jessel, reluctantly followed the previous decisions, saying, however, that "not one of the judges appear to me to have considered the real point, namely, whether a restriction on alienation, such as there is in the present case, is valid." The view which he seems to have been disposed to take was that the

(e) *Re Clarke's Trusts*, 21 Ch. D. 748.

(f) *Re Benton*, 19 Ch. D. 277. See also *Re Bown*, 20 S. J. 690; reversing 49 L. T. 165.

(g) See *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Bown*, *supra*; *Re Ellis' Trusts*, L. R., 17 Eq. 409.

(h) *Fry v. Capper*, Kay, 163; *Armitage v. Coates*, 35 Beav. 1; *Re*

Teague's Settlement, L. R., 10 Eq. 564; *Re Cunynghame's Settlement*, L. R., 11 Eq. 324; *Buckton v. Hay*, 11 Ch. D. 645.

(i) *Re Michael's Trusts*, 46 L. J., Ch. 651.

(k) *Cooper v. Larocche*, 17 Ch. D. 368. And see *Herbert v. Webster*, 15 Ch. D. 610.

(l) 11 Ch. D. 645.

restraint on anticipation, which is a purely equitable creation, ought to have been permitted to infringe upon the rule against perpetuities, in favour of married women, to enable them to enjoy their property, as it had already infringed the general law against inalienable property. Chap. XI. s. 3.

It is submitted that this subject must be reconsidered, having regard to the alteration introduced by the Conveyancing and Law of Property Act, 1881 (*m*), which, by the 39th section, enables the Court, when it appears to be for the benefit of a married woman, to bind her interest in any property where she is restrained from anticipation. And where a married woman is a tenant for life, or has the powers of a tenant for life under the Settled Land Act (*n*), a restraint on anticipation does not prevent her from selling the property under the powers of that Act (*o*). There would thus seem to be good reason for maintaining that, as the object of the rule against perpetuities was to establish liberty of alienation, a restraint on anticipation which does not wholly prevent alienation cannot be regarded as an infringement of the rule. Effect of
Conv. Act,
1881, s. 39.

Recent legislation has not interfered with existing restrictions on anticipation, and has not affected the right to attach in future such a restriction to the enjoyment of property by a married woman, except in the sole case where a woman makes a settlement of her own property with a restraint on anticipation. Married
Women's
Property Act,
1882.

By the 19th section of the Married Women's Property Act, 1882, it is enacted as follows:—

“Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, or agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any

(*m*) 44 & 45 Vict. c. 41.

(*o*) Sect. 61, sub-s. 6.

(*n*) 45 & 46 Vict. c. 38.

Chap. XI. s. 3. greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

Restraint
attached by a
woman to her
own property.

Before the Married Women's Property Act, 1882 (*p*), a woman about to marry could settle her property with a restraint on anticipation (*q*), but it seems that such a restraint did not prevent ante-nuptial creditors from obtaining payment out of the fund (*r*).

A single
woman can-
not be re-
strained.

As the separate use cannot exist but in the married state, so neither can the restraint upon anticipation. There is no form of limitation whereby a single woman can be prevented from squandering her income, or dissipating her means (*s*). If, then, property becomes vested in her while discover, although the instrument may express that the gift is to her separate use and subject to restraint upon anticipation, she may, nevertheless, dispose of it absolutely; because property cannot be given to a *feme sole*, any more than to a man, without being subject to the incidents which property implies; and one of the first of these is the unlimited power of alienation.

But when she
marries the
restraint will
operate.

But if she marry without having indicated an intention of discharging the property from the restraint upon anticipation, it will thereupon attach and become effective.

The separate use no longer, as a general rule, depends upon limitation, but arises by statute; and its connection with the restraint on anticipation is therefore less intimate than it was before the recent Act. Formerly, a spinster entitled to property limited to her separate use without power of anticipation could not upon her marriage, unless she executed a formal settlement, reject the restraint while retaining the separate use. It is now otherwise, and it may be presumed that slight circumstances

(*p*) 45 & 46 Vict. c. 75.

(*q*) *Hastie v. Hastie*, 2 Ch. D. 304.

(*r*) *Sanger v. Sanger*, L. R., 11 Eq. 470; *London and Provincial Bank v. Bogle*, 7 Ch. D. 773; *Bursill v. Tanner*, 32 W. R. 827.

(*s*) *Re Young's Settlement*, 18 Beav.

199. In this respect she stands on the same footing as a man; and what his position is, in this respect, may be collected from Lord Eldon's decision in *Brandon v. Robinson*, 18 Ves. 429; 1 Rose, 197. See *Gilchrist v. Cator*, 1 De Gex & Sm. 188.

will be held sufficient to manifest an intention on her part to cast off the fetter (*t*). Chap. XI. s. 3.

The moment, however, that she again becomes single, the separate use, and the restraint on anticipation, will both cease, though still capable of revival upon subsequent marriage, and extinction upon subsequent discoverture, *toties quoties* (*u*).

Like the separate use itself (of which it is the guard), the restraint upon anticipation requires for its establishment no technical form of words. But the intention must be clear. What words
will restrain
anticipation.

It is not necessary (as seems to have been thought by some) that express negative words should be introduced in the receipt clause (*x*). The restraint may be effectually imposed by an English testator upon a married woman domiciled in a country whose laws would refuse to recognize its validity (*y*).

In *Brown v. Bamford* there was a bequest to trustees, to pay the income of property to such person or persons as a married woman should, by writing under her hand, but not by way of anticipation, appoint; and in default of such appointment into her proper hands, for her sole and separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges. Here it will be observed the restraint on anticipation was in terms limited to her exercise of the power; but Lord Lyndhurst decided that the restraint applied to an assignment as well as to an appointment, observing that it could not reasonably be supposed that the testator would have been so careful, as he evidently was, to exclude *one* mode of anticipation, and at the same time mean to leave the property subject to alienation in *another* form (*z*).

A marriage settlement directed the trustees during the wife's life to receive the income of the settled property, when and as

(*t*) See as to what acts while discoverture amounted to a determination of the trust for the separate use, *Wright v. Wright*, 2 J. & H. 647; *Mayd v. Field*, 3 Ch. D. 587.

(*u*) *Tullett v. Armstrong*, 1 Beav. 1; S. C. on appeal, 4 Myl. & Cr. 377; *Scarborough v. Borman*, 1 Beav. 34; S. C. on appeal, 4 Myl. & Cr. 378; *Clarke v. Jaques*, 1 Beav.

36; *Dixon v. Dixon*, 1 Beav. 40; *Hawkes v. Hubback*, L. R., 11 Eq. 5.

(*x*) *Harrop v. Howard*, 3 Hare, 624; *Brown v. Bamford*, 1 Phil. 620.

(*y*) *Peillon v. Brooking*, 25 Beav. 218.

(*z*) *Brown v. Bamford*, *supra*. See also *Moore v. Moore*, 1 Coll. 54; *Harnett v. Macdougall*, 8 Beav. 187.

Chap. XI. s. 3. often as the same should become due, and to pay it to such person or persons as she might from time to time appoint, or to permit her to receive it for her separate use; and it declared that her receipts, or the receipts of any person or persons, to whom she might appoint the same, *after it should become due*, should be valid discharges for it. The Vice-Chancellor of England held that the wife was restrained from anticipation (a).

A gift of property to separate use, "but not to be sold or mortgaged," was held by Vice-Chancellor Wigram to be subject to this restraint (b).

Words insufficient for this purpose.

But a mere direction to pay income to the wife's separate use *from time to time*, will not restrain her from alienation (c). Similarly, where it is directed that her receipts *from time to time* shall be effectual discharges (d), or that the trustees shall pay the income into her own proper hands (e), the married woman possesses the power of alienation.

A testator bequeathed a sum of consols to trustees, and directed that it "should remain during his wife's life, and be (under the orders of the trustees) made a duly administered provision for her, and the interest of it given to her on her personal appearance and receipt." It was held that these words were insufficient to impose a restraint on anticipation (f).

In *Acton v. White* (g), a testator devised a freehold estate to trustees in trust to pay the rents as the same should become due and payable into the hands of his wife, and not otherwise, for her life to her separate use: and he directed that the receipts of his wife alone, for what should be actually paid into her own proper hands, should be good discharges to his trustees. Sir John Leach held that the wife was not restrained from alienation;

(a) *Field v. Evans*, 15 Sim. 375; see, however, comments on this case in *Baker v. Bradley*, 2 Sm. & G. 531, 561; 7 De G., M. & G. 597.

(b) *Steedman v. Poole*, 6 Hare, 193.

(c) *Parke v. White*, 11 Ves. 209, 222; *Clarke v. Pistor*, 3 Bro. C. C. 347, n., and cited 568; *Glyn v. Baster*, 1 You. & Jer., Exch. in

Eq. 329.

(d) *Pybus v. Smith*, 3 Bro. C. C. 340; *Witts v. Dawkins*, 12 Ves. 501.

(e) *Sturgis v. Corp*, 13 Ves. 190; *Browne v. Like*, 14 Ves. 302; *Hovey v. Blakeman*, cited in *Wagstaff v. Smith*, 9 Ves. 524.

(f) *Re Ross's Trusts*, 1 Sim., N. S. 196.

(g) 1 Sim. & Stu. 429.

his Honor observing that the words were intended only to Chap. XI. s. 3. exclude the marital right, that is, to establish a separate use in the wife; but that they did not go the further length of "controlling the right of disposition which is incident to property."

In *Alexander v. Young* (h), stock was bequeathed to the separate use of a married woman for life, and after her decease to her appointee by deed or will, with a direction *that any appointment by deed should not come into operation until after her death*. This was held by V.-C. Wigram to be no restraint upon anticipation. If his Honor had not so decided, it might, perhaps, have been thought that the testator's intention was different (i).

The restraint upon anticipation is designed for the protection of married women, a protection which is extended to them even against their own fraudulent acts. Thus, where a married woman, concealing the restraint on anticipation, purported to mortgage the property, a charging order upon her next accruing dividend, which had been obtained by the mortgagee, was set aside, on the express ground that "in no case, and by no device could the restraint upon anticipation be evaded" (k). Effect of clause.

It is also well established that the income of a married woman, which is subject to the restraint, cannot be impounded to make good her breach of trust (l). Not liable for her breaches of trust.

In *Clive v. Carew* (m), the property had belonged to the wife before her marriage, and consisted of (1) a valuable pearl

(h) 6 Hare, 393.

(i) Here may be mentioned the case of *Baker v. Newton*, 2 Beav. 112, where a testator bequeathed to his daughter, a married woman, 25,000*l.* for her own absolute use, without liberty to sell or assign during her natural life. According to the report, Lord Langdale held that she took absolutely, "with a restriction against alienation during life." The marginal note describes her as a *feme sole*, which she was not when the gift took effect. It must not be inferred from this, that a single woman can be restrained from anticipation. The decision really

imports no more than that she took an absolute interest in the property bequeathed. It was urged that she took for life only. The case was not one of separate use; nor is it of much value, though somewhat startling on a first perusal. There is evidently an error in the report.

(k) *Stanley v. Stanley*, 7 Ch. D. 589; and see *Jackson v. Hobhouse*, 2 Mer. 483; *Arnold v. Woodhams*, L. R., 16 Eq. 29; *Kenrick v. Wood*, L. R., 9 Eq. 333.

(l) *Clive v. Carew*, 1 J. & H. 199; *Pemberton v. M'Gill*, 1 Dr. & Sm. 266.

(m) 1 J. & H. 199.

Chap. XI. s. 3. necklace, which was settled as an heirloom; (2) other jewels and effects settled upon the wife absolutely for her separate use; and (3) certain freehold and leasehold lands, to the rents and profits of which the married woman was entitled for life for her separate use, without power of anticipation. The lady having sold the necklace, the trustees filed a bill against the husband, the wife and the children of the marriage, praying that the Court would give such directions as might be necessary, with a view to recovering or replacing the necklace. It was decided that the jewels and effects, to which the wife was absolutely entitled, were liable to make good the value of the necklace, but that her interest in the property, limited to her separate use for life with restraint on anticipation, was not so liable during the existing coverture; and liberty was given to apply on its determination, "because," as the Vice-Chancellor remarked, "on that event happening, there may be a possibility of recouping the loss occasioned by this breach of trust."

Arrears of
income.

Pike v.
Fitzgibbon.

In several cases (*n*) arrears of restrained income, which had accrued after the married woman's liability was incurred, have been applied in satisfaction of such liability. These decisions, however, are inconsistent with, and must be taken to have been overruled by, the recent case of *Pike v. Fitzgibbon* (*o*), where it was laid down that the *only* property of a married woman, which could be reached in satisfaction of her general engagements or debts, was the separate property to which she was entitled free from any restraint on anticipation *at the time of contracting* the debt or engagement, or to so much of that property as she remained entitled to at the time when judgment was given; but that neither separate property, even though unfettered by any restraint on anticipation, to which she became entitled after the time of contracting the debt or engagement, nor separate property, subject to a restraint on anticipation, to which she was entitled at that time, were liable to satisfy her obligations.

Overruled by
Act of 1882.

This decision has been overruled by the Married Women's

(*n*) *Pemberton v. M'Gill*, 1 Dr. & 15 Eq. 266.
Sm. 266; *Claydon v. Finch*, L. R., (*o*) 17 Ch. D. 454.

Property Act, 1882 (*p*). That Act rendered not only the separate property which a married woman is entitled to at the date of the contract, but also all separate property which she may *thereafter* acquire, liable to satisfy her contracts; and it is therefore perfectly clear that, as regards property not subject to a restraint on anticipation, a creditor of a married woman can reach all such property, whether acquired before, at, or after the date of the contract; but what his position may be with regard to separate property subject to a restraint on anticipation, is not so certain.

The Married Women's Property Act, 1882 (*q*), specially provides that nothing in the Act contained shall interfere with or render inoperative any restriction against anticipation then attached, or to be thereafter attached, to the enjoyment of any property or income by a woman under any instrument. This enactment seems to be intended to preserve to the fullest extent the protection afforded by the usual clause restraining anticipation; but it may be doubted whether, having regard to the provision which renders after-acquired property liable to satisfy the obligations of a married woman, this protection is not indirectly weakened; and the question seems to arise whether, as after-acquired separate property is now available to satisfy a married woman's obligations, any alteration has been made in the law as to the liability of property subject to a restraint on anticipation.

Effect of the Act of 1882 on restraint upon anticipation.

It is an obvious truism that the restraint on anticipation never affected income which had accrued due, so that under the old law a creditor, whose debt had been incurred after such income had accrued due, could reach the accrued payments in satisfaction of his debt. But he could not in any way reach subsequent income, either before or after it had accrued due; for, as James, L. J., said, in *Pike v. Fitzgibbon* :—

“Twist it in any way you like, the conclusion which we are asked to arrive at is, that a married woman restrained from anticipation can anticipate. That is the result if it is put into plain English, because whether it is done by deed or by letter, or by the creation of a debt which in

(*p*) 45 & 46 Vict. c. 75, s. 1 (5).

(*q*) Sect. 19.

Chap. XI. s. 3. the result operates to charge the property, it is an anticipation of the property, by which the lady deprives herself of something which she otherwise would receive. That this is anticipating her future income would seem to me to be too plain a proposition to be seriously contested" (r).

It is apprehended that this is a perfectly correct statement of the present law upon anticipation, and that in no possible way can a married woman bind her future income, which she is restrained from anticipating, or render herself liable to satisfy debts out of such income.

Restraint
indirectly
affected by
Act of 1882.

But, though it is conceived that thus far the old law is unaffected, it would seem that the alteration, by which after-acquired property is now liable to a married woman's obligations, has effected a change to this extent, that if, immediately that any payment of restrained income has accrued due, a creditor for an antecedent debt can obtain possession of it before the married woman, or take it in execution before she has paid it or assigned it elsewhere, he will be entitled to payment out of that accrued income, whereas under the old law he could not have reached it in any manner.

It would seem also to follow, that as the restraint upon anticipation ceases upon the determination of the coverture by the death of the husband, a married woman's separate property, to which such a restraint is attached, will now be liable to satisfy debts incurred during coverture.

Bankruptcy
of married
woman.

In connection with this subject, a difficulty may be mentioned, which seems to arise when a married woman entitled to separate property, with a "restriction against anticipation," becomes bankrupt. If the object of the restraint is to be effectuated, and the accruing payments are to constitute an inalienable provision for the married woman, not only the fund itself, but the periodical payments after they fall due, should be protected from the operation of the bankrupt laws.

But under the Bankruptcy Act, 1883, as under that of 1869, the property of the bankrupt divisible amongst his creditors comprises not only such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, but also whatever may be acquired by or devolve on him before his

discharge (s). Under this latter head would seem to be included the successive payments of income, subject to restraint on anticipation, at the very instant when they accrue due, and thereby the protective effect of the clause restraining anticipation would, during the continuance of the bankruptcy, be rendered nugatory. Whether the words of the section are wide enough to include such income is a question which seems to require the decision of the Court. Chap. XI. s. 3.

Although interest is for some purposes treated as accruing from day to day, a married woman restrained from anticipation is not able to assign the apportioned part of the current interest which has accrued due up to the date of assignment, but can only deal with the income, after it becomes payable under the provisions of the instrument which creates the trust (t). Income cannot be assigned until receivable.

Certain extra-judicial observations of Lord Justice Knight Bruce, in the case of *Derbishire v. Home* (u), have given some foundation for the opinion that "a clause against anticipation does not exempt a married woman from the ordinary consequences of lapse of time and acquiescence." Acquiescence, however, in the contemplation of the Courts, is merely evidence of a release; and where an express release would be inoperative, so, also, it is submitted, must be that constructive release, which is founded on delay or acquiescence. Acquiescence.

Whether a married woman, being a tenant for life, is restrained from anticipation or not, she cannot authorize trustees to commit a breach of trust by investing upon insufficient securities (x). There is, however, this difference between the two cases, namely, that if she is not restrained from anticipation, her income may be impounded to recoup the trust funds the loss which has been sustained; whereas, in the other case, it cannot be touched.

Notwithstanding the restraint on anticipation, the property may, in some cases, be dealt with or affected, either by the order of the Court or the acts of the parties. Thus, a married woman can, it seems, compromise an action, the subject-matter of which Compromise of action.

(s) 46 & 47 Vict. c. 52, s. 44.

(u) 3 De G., M. & G. 80.

(t) *Re Brettle*, 2 De G., J. & S.

(x) *Davies v. Hodgson*, 25 Beav.

Chap. XI. s. 3. is property of this nature (*y*). The income may be applied, at all events when there is an express power in the settlement, in reimbursing the trustees any costs and expenses which they may have properly incurred (*z*); and a solicitor may be declared, under 27 & 28 Vict. c. 127, s. 28, to be entitled to a charge for the costs of recovering or preserving such property (*a*).

Power of
barring
estate tail not
affected by
restraint.

Settled Land
Act, 1882.

The restraint on anticipation does not prevent a married woman from barring an estate tail, and acquiring a fee simple under the Act for the abolition of fines and recoveries (*b*), or from exercising the powers, including the power of sale, conferred by the Settled Land Act, 1882 (*c*). But in both these cases nothing is withdrawn from the settlement, as the restraint on anticipation attaches to the substituted property.

Conv. Act,
1881, sect. 39.

It was formerly held (*d*) that the Court had no jurisdiction, even when it would have been eminently advantageous to the married woman, to loose this fetter of its own forging; but by the Conveyancing and Law of Property Act, 1881 (*e*), it is enacted that, notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order with her consent, bind her interest in any property.

In some of the earlier cases which came before the Court under this section, it seems to have been assumed that there was jurisdiction to remove the restraint altogether (*f*); but in a recent case before the Court of Appeal (*g*), it was pointed out that to remove the restraint was a very different thing from making a disposition binding the wife's interest; and the application for the conversion of the fund into an annuity for the wife was accordingly refused. This case must be taken as over-

(*y*) *Wilton v. Hill*, 25 L. J., Ch. 156; *Wall v. Rogers*, L. R., 9 Eq. 58; *Heath v. Wickham*, 5 L. R., Ir. 285.

(*z*) *D' Oechener v. Scott*, 24 Beav. 239.

(*a*) *Re Keane*, L. R., 12 Eq. 115.

(*b*) *Cooper v. Macdonald*, 7 Ch. D. 288.

(*c*) 45 & 46 Vict. c. 38, s. 61 (6).

(*d*) *Robinson v. Wheelwright*, 6 De G., M. & G. 535.

(*e*) 44 & 45 Vict. c. 41, s. 39.

(*f*) *Hodges v. Hodges*, 20 Ch. D. 749; *Musgrave v. Sandeman*, 48 L. T. 215.

(*g*) *Re Warren's Settlement*, 49 L. T. 696. See also *Tamplin v. Miller*, 30 W. R. 422.

ruling *Hodges v. Hodges* (*h*), where the fund was applied in Chap. XI. s. 3. payment of the married woman's debts.

Where the property consists of a fund in Court, it will not be paid out except on the separate examination of the married woman (*i*).

SECTION IV.

PIN-MONEY.

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The wife's pin-money has several points of resemblance to Chap. XI. s. 4. her separate estate, and in some respects is but faintly distinguishable from it. Resembles separate use.

Pin-money may be defined as a provision for the wife's dress and pocket, to which there is annexed a duty of expending it in her "personal apparel, decoration, or ornament" (*k*). Definition.

In this respect it differs from separate property which, as we have seen (*l*), the wife enjoys as a *feme sole*, and subject to no duty or control in the mode of its application. How it differs from separate use.

(*h*) 20 Ch. D. 749.

(*i*) *Musgrave v. Sandeman*, *supra*. See, however, *Hodges v. Hodges*, *supra*.

(*k*) Per Lord Langdale, *Jodrell v. Jodrell*, 9 Beav. 45. Its amount, however, is occasionally so great as to suggest that something more is meant than a provision for dress, or pocket-money. Thus the marriage settlement of Mrs. Wellesley Pole secured her an income of 13,000*l.* a-year for pin-money. See 2 Russ. 1. And as to the duty of expending it in personal decoration, Lord St.

Leonards (in his work on the Law of Property as administered by the House of Lords, p. 166) holds it to be a duty of imperfect obligation. Johnson says pin-money means an "allowance for the wife's private expenses *without account*." Besides personal decoration, its objects, it would appear, may be charities to the poor, and largesses to servants, or attendants. See *Howard v. Digby*, 2 Cl. & Fin. 634, 658; 8 Bligh, 224.

(*l*) See *ante*, p. 285.

Chap. XI. s. 4. Pin-money also differs from paraphernalia, inasmuch as it is

How from paraphernalia.

When wife presumed to waive pin-money.

If she survive entitled only to one year's arrear.

Effect of her becoming insane.

enjoyed by the wife during coverture; whereas her right to paraphernalia does not arise till she has become a widow (c).

It would seem that pin-money is generally understood to move from the husband. The law apparently conceives that the splendour of the wife's appearance contributes to his enjoyment (d); and she is to attire herself according to his rank, not her own. Therefore, if she permit her pin-money to run in arrear, it is said that, should she survive her husband, she will be entitled to demand only one year's arrear prior to his death (e).

It has even been decided by the House of Lords, that if she become insane, and so remain till her death, her personal representatives will not be allowed *any* arrears, even although the pin-money were secured by an ante-nuptial settlement (f).

(c) See *ante*, p. 114.

(d) Lord Brougham held, in *Howard v. Digby* (2 Cl. & Fin. 658, and 8 Bligh, 224), that pin-money is "a fund which the wife may be made to spend during the coverture by the intercession and advice, and at the instance of her husband." The husband may say to his wife, "If you do not dress yourself as you ought to do, what occasion have you for pin-money?" Again, his Lordship adds, "To be spared the eyesore of a wife appearing as misbecomes her station—that is the object of pin-money." Lord St. Leonards, however, in his work on the Administration of the Law of Property by the House of Lords, p. 166, says: "The wife's pin-money is *not* a fund which she may be made to spend during her coverture. She may recover, if she pleases, her pin-money annually, or at the times fixed by the settlement; and though she were a miser and a slattern, her husband would be without remedy. Nothing could strike more fatally at the peace of families than a doctrine which would enable a husband to coerce his wife

in the expenditure of her pin-money, or call her to an account for its application."

(e) *Peacock v. Monk*, 2 Ves. sen. 190; *Thrupp v. Harman*, 3 Myl. & K. 513. See, however, *Bidout v. Lewis*, 1 Atk. 269.

(f) See Lord Chancellor Brougham's speech in *Howard v. Digby*, 2 Cl. & Fin. 651, and 8 Bligh, 224. Lord St. Leonards (Law of Property as administered by the House of Lords, p. 163), in commenting on *Howard v. Digby*, observes, "The wife was incapable of assenting to the husband's appropriating any part of the pin-money to his own use. If the wife, whilst sane, had received her pin-money, any savings would, notwithstanding what was said in the House of Lords, on the general doctrine, clearly belong to the wife surviving. During the lunacy there was, we will suppose, a large saving. Why should she, surviving, be deprived of her right to it? Suppose her then to have recovered her mental faculties (she lived five years after her husband), why should she not have the fund

The object, in short, of pin-money is to enable the wife (without constantly appealing to her husband) to attire and deck herself in a style corresponding with his position in the world. Chap. IX. s. 4.

If the pin-money be secured by ante-nuptial settlement or articles, the misconduct of the wife, how flagrant soever, will not prevent the Court from enforcing her rights so secured (*g*). Wife's misconduct not necessarily a bar to the claim.

It was formerly the practice to secure the payment of the wife's pin-money, by limiting the family estates in the marriage settlement to trustees for a long term of years, called the pin-money term, the trusts of which were to raise an annuity for the wife during coverture (*h*). But it is submitted that, having regard to the provisions of the Married Women's Property Act, 1882, the term of years is no longer necessary, and that it will for the future be equally efficacious to limit a legal rent-charge of the requisite amount to the wife during the coverture without power of anticipation (*i*). She will, under the Conveyancing and Law of Property Act, 1881 (*k*), be thereupon entitled to all the remedies for the recovery of the rent-charge, which were formerly available under the limitations of the settlement. How secured.

belonging to her by contract—and remaining unpaid and unapplied—to add to her enjoyments—to replace her long-neglected wardrobe, and the ornaments of her person—to re-establish her charities—to reward her ancient dependants? Her lunacy, no doubt, was a heavy calamity; but the husband was not to seek for compensation in appropriating the income expressly provided for her by her marriage settlement. I have once more looked into all the cases on this subject; but I cannot find any which would support this decision of the House of Lords. There are, however, several which it would seem to be difficult to reconcile with that authority.” The truth is, the

rules respecting pin-money are not very rational; but fortunately few cases now arise upon it. Separate use has, in a great measure, superseded it. The theory propounded by Lord Chancellor Brougham in *Howard v. Digby*, and that put forward by Lord St. Leonards in this note, are widely opposed. Yet both have the merit of plausibility.

(*g*) *Moore v. Moore*, 1 Atk. 272. See *ante*, p. 234, as to settlements in pursuance of ante-nuptial articles.

(*h*) *Dav. Conv.*, 3rd ed., vol. iii., 403.

(*i*) See *Key & Elphinstone's Precedents*, 2nd ed., vol. ii., 558.

(*k*) 44 & 45 Vict. c. 41, s. 44.

SECTION V.

THE WIFE'S EARNINGS AND SEPARATE TRADING.

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Chap. XI. s. 5.

Formerly the earnings of the wife might be her separate property.

Formerly the husband was, by the common law, entitled to the fruits of his wife's labour. But, independently of the statutory protection of recent years, the earnings of married women were in many cases preserved for their benefit by the Court of Chancery under the doctrine of separate use. For, if a husband agreed with his wife that she should be at liberty to carry on a separate trade or business,—and such an agreement might be established by acts, as well as by the most formal instrument,—the husband was in equity converted into a trustee for the wife, not only of the profits which she made, but of the stock-in-trade, capital and effects employed in the business (*a*). In an early case (*b*), a husband allowed his wife to dispose and make profit of the butter, eggs, poultry, pigs, fruit, and other trivial matters arising from his farm for her separate use, calling it pin-money; and he had borrowed from her 100*l.*, to make up the purchase-money of an estate. Although the agreement was post-nuptial, and not evidenced by any writing, the Lord Chancellor (*c*) decreed that the widow was entitled to prove as a creditor for the 100*l.*, observing that “the courts of equity have taken notice of and

(*a*) *Ashworth v. Outram*, 5 Ch. D. 923, and see the cases there cited.

(*b*) *Slanning v. Style*, 3 P. Wms. 334.

(*c*) Lord Talbot.

allowed *feme covert*s to have separate interests by the husbands' Chap. XI. s. 5. agreements" (d).

The question was, whether the business was carried on solely by the wife, or jointly by her and her husband, and was, as it is now under the recent statute, a question of fact. If it was the sole business of the wife, the trade property was not distributable under her husband's *fiat*; but if it was a joint business, or if the husband participated in its benefits, then the trade property was affected by his obligations, and he was held liable for goods supplied for the purposes of the business (e).

Such an agreement between the husband and wife might not in some cases have been entered into, or it might be difficult to establish, and for these the Act of 1870 provided a statutory Act of 1870. remedy. By the first section it was enacted that—

"The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property" (f).

The case of *Ashworth v. Outram* (g) was decided as much *Ashworth v. Outram.* upon the general principles of courts of equity as under the special provisions of the Married Women's Property Act, 1870. The facts were shortly as follows:—In the year 1855, Sarah Outram, then Sarah Fairbank, spinster, became the housekeeper of Thomas Outram and manager of part of his farming business. He shortly afterwards engaged to marry her, but the marriage did not take place till 1874. Sarah Fairbank, with the knowledge and consent of Thomas Outram, in 1861 commenced the

(d) As to gifts from husband to wife, see *Walter v. Hodge*, 2 Swanst. 92; *Mews v. Mews*, 15 Beav. 529; *Hoyes v. Kindersley*, 2 Sm. & G. 195; *Baddeley v. Baddeley*, 9 Ch. D. 113; *Fox v. Hawks*, 13 Ch. D. 822; *Re Breton's Estate*, 17 Ch. D. 416.

(e) *Jarman v. Woollaton*, 3 T. R. 618; *Petty v. Anderson*, 3 Bing. 170; *Barlow v. Bishop*, 1 East, 432; *Cotes v. Davis*, 1 Campb. 485.

(f) 33 & 34 Vict. c. 93, s. 1.

(g) 5 Ch. D. 923.

Chap. XI. s. 5. business of fruit preserving, which ultimately developed into a profitable wholesale business. At the date of the marriage there was a considerable balance at her bankers, and a large stock of preserves on the premises of her husband. She continued after the marriage to carry on the preserving business in precisely the same way as before, even to the extent of retaining her maiden name upon the pots of preserves. Within a few months of the marriage Thomas Outram died intestate, whereupon his widow claimed to retain the business as her own, and refused to take out administration, which was granted to one of his sisters; and an action was commenced for the administration of his estate.

In this action it was decided that the capital and stock-in-trade of the business belonged to the widow, and were not part of the husband's estate. This decision might possibly have been the same, even if the Married Women's Property Act, 1870, had not been passed; and, indeed, Baggallay, L. J., founded his judgment on general principles of equity, and not upon the provisions of the statute. But, on the other hand, Lord Coleridge, C. J., and James, L. J., seem to have relied principally upon the section to which reference has been made.

Power of married woman to sue for recovery of separate property.

A married woman was also empowered by that Act (*h*) to maintain an action in her own name for the recovery of any wages, earnings, money and property by the Act declared to be her separate property, and was declared to be entitled to the same remedies, civil and criminal, for its protection, as if she were an unmarried woman; but these remedies extended no further, and did not give a married woman any general right to contract or to sue in her own name for damages for breach of contract.

These provisions have now been repealed, but are re-enacted in substantially identical terms by the Act of 1882.(*i*). But it must be borne in mind that the limitation above alluded to, as subsisting under the Act of 1870, no longer exists, for now a married woman can enter into contracts, and sue, and be sued, in her own name as if she were a *feme sole*. Under this Act, as well as under the Act of 1870, the question, whether the circum-

(*h*) 33 & 34 Vict. c. 93, s. 11.

(*i*) 45 & 46 Vict. c. 75, ss. 2, 5, 12, 22.

stances of the particular case amount to a separate trading, is one of fact for the jury; but, in cases to which the new law applies, it is presumed that much slighter evidence than was formerly necessary will suffice to establish this question in favour of the wife, especially when the business belonged to her before marriage. The mere fact of the husband living in the house at the time when the business is being separately carried on by the wife, does not deprive the wife of the protection afforded by the Act (*k*). Among the almost conclusive indications of "separate trading" may be mentioned the retention of the woman's maiden name in the business, and the existence of a separate banking account in her name (*l*). Separate trading was held to have subsisted, where the husband having been removed to an infirmary, the wife, with the help of friends, continued the business in which he had been engaged, and the husband, on his return, did not interfere with the business (*m*). It was also so held, where the wife kept a private hotel (*n*); but where the husband acted in the business as the agent of the wife, or the wife as manager for the husband, it was held that she was not carrying on a separate trade (*o*).

Chap. XI. s. 5.

What will constitute separate trading.

When the wife, after the death of her husband, claims certain property as pertaining to her separate trade, her evidence must be corroborated, or else she can obtain no relief. Thus it has been held, that in the absence of proof of an unequivocal, complete and final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not after his death, upon her uncorroborated statement that he expressly authorized her to carry on upon her own account the business of a farm which she had rented before marriage, and to treat the proceeds as her separate property, admit her claim as against his estate to the proceeds of the farm, which were invested by him during his lifetime (*p*).

(*k*) *Lovell v. Newton*, 4 C. P. D. 7.

(*l*) *Ashworth v. Outram*, 5 Ch. D. 923. See further, as to what constitutes separate trading, *Ex parte Shepherd*, 10 Ch. D. 573; *Re Whittaker*, 21 Ch. D. 657.

(*m*) *Lovell v. Newton*, 4 C. P. D. 7.

(*n*) *Wood v. Wood*, 19 W. R. 1049.

(*o*) *Re Whittaker*, *supra*; *Laporte v. Cosstick*, 23 W. R. 131.

(*p*) *Re Whittaker*, *supra*.

Chap. XI. s. 5.

Consequences
of separate
trading.

Power to
contract and
to sue.

Bankruptcy.

Bill or note.

Bond.

Right to sue
in her own
name.

Assuming that the wife is engaged in carrying on a trade separate from her husband, it becomes necessary to consider some of the consequences of her doing so.

A married woman being a separate trader has, for the purposes of her business, all the powers of contracting and of suing which are conferred by the Act in respect of separate property generally; and she may, of course, also bind her trade assets by any contract which she makes. It is also provided that "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*" (q); and it is to be observed that on bankruptcy *all* her creditors, and not merely those connected with the trade, will be admitted to prove on equal terms. Formerly, a married woman trading could not be made bankrupt, even though she had separate estate (r), unless she traded by custom as a *feme sole* within the City of London (s); unless her husband was a convict, and so civilly dead (t); or, perhaps, unless she had been constituted a *feme sole* by statute, as when living apart from her husband, under a decree of judicial separation or a protection order (u).

Formerly, when a bill of exchange or promissory note was given to a married woman, her husband alone could indorse or sue upon it (x); and, in like manner, if a bond were given to husband and wife, the husband alone might have sued on it as on a bond made to himself (y); but now, in such matters, a position of independence has been conferred upon a married woman, which entitles her to maintain an action in her own name.

(q) 45 & 46 Vict. c. 75, s. 1 (5). Under the old law the wife of a man *civiliter mortuus* was, if a trader, liable to bankruptcy; *Ex parte Franks*, 7 Bing. 762; but see *Williamson v. Dawes*, 9 Bing. 292. The Act of 1870 did not enable married women to be made bankrupts; *Ex parte Jones*, 12 Ch. D. 484; and see *Reg. v. Robinson*, L. R., 1 C. C. R. 80; *Day v. Freund*, 25 W. R. 222; *Ex parte Holland*, L. R., 9 Ch. 307;

Ex parte Shepherd, 10 Ch. D. 573.

(r) *Ex parte Jones*, L. R., 12 Ch. D. 484; *Ex parte Holland*, L. R., 9 Ch. 307.

(s) 2 Roper, Husband and Wife, 124; *Lavie v. Phillips*, 3 Bur. 1776.

(t) *Ex parte Franks*, 7 Bing. 762.

(u) 20 & 21 Vict. c. 85, ss. 21, 26; 41 & 42 Vict. c. 19.

(x) *Mason v. Morgan*, 2 A. & E. 30.

(y) *Ankerstein v. Clarke*, 4 Term Rep. 616.

A married woman being empowered by the Act of 1870 to take proceedings for "the protection and security" of her separate property, was entitled to maintain an action against her bankers for dishonouring cheques drawn by her in respect of her separate trade, or for not duly presenting or not giving due notice of dishonour of a bill of exchange acquired by her in such trade, and intrusted to them by her for presentment (z); and *à fortiori* under the Act of 1882 she is entitled to the same remedies. It would seem that she can also obtain, if the special circumstances justify the interference of the Court, an injunction restraining her husband from intermeddling with her separate property (a).

The trade which the Acts contemplate being carried on "separately from her husband," may be so carried on in partnership with any other person or persons, without imposing on the husband the liabilities of a partner (b); and even with her husband she may form a *quasi* partnership (c); but it is presumed that in order to establish such a relation the evidence should be very clear.

The husband was formerly liable for the debts of the concern, if it appeared that he participated with his wife in its benefits. Thus, in *Petty v. Anderson* (d), the husband and wife were living together, and the business was carried on in the house, though the wife's name appeared alone in the purchase of goods, in the bills of parcels, in the parish rates, and in a contract with the parish officers; yet, inasmuch as the husband partook of the profits, and was cognizant of, and assented to, the dealings, he was held liable for goods delivered at the house for the purposes of this trade (e). It would seem, however, that now, unless actual partnership be established, the mere fact that the profits of the wife's trading are enjoyed by the husband will not render him liable for the debts of the business.

Chap. XI. s. 5.

Separate trading may be in partnership.

The husband's liabilities where he participated.

(z) *Summers v. The City Bank*, L. R., 9 C. P. 580. ley on Partnership, bk. i. ch. 3, s. 2.

(a) *Green v. Green*, 5 Hare, 400, (c) *Re Childs*, L. R., 9 Ch. 508.

n.; *Wood v. Wood*, 19 W. R. 1049; (d) 3 Bing. 170.

Symonds v. Hallett, 24 Ch. D. 346. (e) See *Barlow v. Bishop*, 1 East,

(b) Formerly a married woman 432; and *Cotes v. Davies*, 1 Camp. 485.

could not be a partner. See Lind-

Chap. XI. s. 5. Nothing in the recent Act seems to throw any light upon the questions, whether the wife can, against the wishes of the husband, carry on a separate trade, or whether the husband can by any legal process restrain her from so doing.

Separate trading according to the custom of London.

With regard to the "custom of London," by which a married woman was enabled to trade as a *feme sole*, the following passages are extracted from the learned and elaborate work of Mr. Roper (*f*). The custom, as translated from the Liber Albus in the town-clerk's office, is as follows:—

Extract from the Liber Albus.

Where a feme covert of the husband useth any craft in the said city on her sole account whereof the husband meddleth nothing, such a woman shall be charged as a feme sole concerning everything that toucheth the craft, and if the husband and wife be impleaded, in such case the wife shall plead as a feme sole; and if she be condemned, she shall be committed to prison till she have made satisfaction, and the husband and his goods shall not in such case be charged nor impeached.

Upon this custom, Mr. Roper says:—

The trade must be carried on within the city, and on the wife's *sole* account; it seems, therefore, that if by any means it can be proved that her husband had any concern in it, the case will not be protected by the custom (*g*).

Husband's intermeddling excluded.

The husband's intermeddling is expressly provided against by the custom. He may, however, determine his wife's trading in future, but he cannot do so in retrospect; neither can he do any act to injure her creditors, who are entitled to be satisfied out of her property in trade; but after those demands are satisfied, he may, as it would seem, by law, possess himself of the surplus of her property; for the custom does not extend to this point, it regarding only trade and commerce (*h*).

Wifemight be made a bankrupt.

The wife, according to this custom, was held liable to a commission of bankruptcy (*i*).

(*f*) 2 Rop. Hus. & Wife, 124.

(*g*) *Langham v. Bewett*, Cro. Car. 68.

(*h*) *Lavie v. Phillips*, 3 Burr. 1776.

(*i*) *Lavie v. Phillips*, *ubi supra*; *Ex parte Carrington*, 1 Atk. 206. See *Beard v. Webb*, 2 Bos. & Pul. 93, where Lord Eldon, then Lord Chief Justice of the Common Pleas, comments on the cases.

CHAPTER XII.

SEPARATION OF HUSBAND AND WIFE BY
PRIVATE ARRANGEMENT.

SECTION I.

CONFLICT OF THE CIVIL AND ECCLESIASTICAL JURISDICTIONS.

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5. <i>Substitution of private separations, and sanction of the civil Courts</i>	336	10. <i>But are relieved from cohabitation</i>	337

THE putting asunder of those whom God has joined together, is prohibited by the policy of the law and the precepts of religion. Hence, all attempts to separate husband and wife were anciently censured as *contra bonos mores*. Chap. XII. s. 1.

Again, the voluntary parting of married persons by their own private arrangement necessarily implied some *contract* between them. This, however, according to the text of Littleton, could not be: for he tells us, "they are but one person in law," and so are incapable of contracting with each other. Hence, all agreements for separation between husband and wife were anciently treated as nullities.

But in cases of adultery, and in cases of cruelty, on the part either of husband or wife, the Church allowed, and by her spiritual Courts awarded, sentences of divorce *à mensâ et thoro*. Ecclesiastical sentences of divorce for adultery and for cruelty.

Separations by private arrangement anciently censured.

Treated as nullities.

Chap. XII. s. 1. And the practice of granting such sentences for such offences became a part of our social institutions, and was recognized in our temporal tribunals. So that for adultery, or for cruelty, separations by ecclesiastical authority might take place without any breach of the law, and (as we must suppose) without any offence to religion.

Therefore, when it was said, as in many cases it was affirmed, that the separation of husband and wife was "prohibited by the policy of the law and the precepts of religion," the proposition must be received with those exceptions and qualifications which the decisions of the spiritual Courts annexed to it.

Futile operation of such sentences.

The sentences of divorce *à mensâ et thoro* granted by those Courts did not often, it must be owned, repay the pains bestowed in obtaining them. For, what was their effect? The husband and wife were indeed personally severed from each other; but the tie of matrimony remained still unloosed. They did not cease to be spouses; they were merely discharged from the duty of cohabitation. They might at any time again come together, and by mutual consent put an end to the sentence, which in fact contemplated and invited a reconciliation.

Substitution of private separations, and sanction of the civil Courts.

Under these circumstances, it was a natural reflection, that for sentences so futile, so inconclusive, and so unsatisfactory, separations *en pais* might advantageously be substituted in all cases of adultery or of cruelty, where the parties concerned had sense enough to agree to such private arrangements; which, consequently, were frequently resorted to by the laity, and came gradually to be countenanced by the temporal Courts, upon the principle that all the good purposes of an ecclesiastical sentence might thereby be attained without the cost, exposure and humiliation necessarily incident to a judicial inquiry (*a*).

Extension of private separations to other cases than those of adultery and cruelty.

More recently it will be found that the temporal Courts, proceeding on considerations of utility and convenience, saw reason for extending their sanction to voluntary separations in cases where neither adultery nor cruelty appeared.

(*a*) "Is it desirable," said Lord Cottenham in the House of Lords, "that parties should be compelled to bring such complaint in the

Ecclesiastical Court to public discussion?" See *Wilson v. Wilson*, 1 House of Lords' Cases, 538.

But, in the words of one who wrote too little, and died too soon (b),— Chap. XII. s. 1.

It may be doubted whether there is any principle of policy which requires that matrimonial disputes (unlike all others) should never be settled by private adjustment, and which renders it better to litigate than to compromise them. In cases where there has been on one side that species of misconduct which, according to law, ought to be followed by a state of separation, the public is not injured if the guilty party acquiesces without a judicial process in that state which the law has declared to be right. In other cases where the conduct has not been such as to form a ground, according to the law of the Ecclesiastical Courts, for a compulsory divorce, it is still a material question whether causes of less moment may not morally justify a separation by consent. And though the circumstances may sometimes be such as not even to afford a moral justification, it is to be remembered that the law does not undertake the task of enforcing every moral duty; and while the parties immediately concerned are satisfied, it is by no means clear that any public interest renders it necessary for courts of justice to interfere, and enter in each case upon an inquiry into moral conduct; an inquiry often so difficult and intricate, that any conclusion which they might arrive at, would be as likely to be wrong as to be right. The wide difference between the views of different judges upon these points proves that it is at least questionable whether the toleration at present allowed to voluntary separations ought to be withdrawn.

Reasons for the use of deeds of separation.

The toleration here referred to has certainly not been withdrawn since the time when Mr. Jacob wrote (c). On the contrary, private separations have not only been judicially sanctioned, but have actually been enforced by the temporal tribunals; and this too in cases where there was no charge either of adultery or of cruelty.

Private separations now enforced by the civil courts.

When husband and wife are separated by private arrangement, they still continue to be husband and wife as before: for, in the great case of *Marshall v. Rutton* (d), a principle (which had been disturbed by some prior determinations) was, upon much consideration, and with great solemnity, affirmed and reiterated by the Court of King's Bench, to this effect, namely, that husband and wife cannot by mutual agreement *change their legal characters and capacities*.

After separation parties still husband and wife;

But although this is undoubtedly true on the one hand, it but relieved from cohabitation.

(b) The late Mr. Jacob. See (c) 1824.
2 Rep. 277, n. (d) 8 Term Rep. 545.

Chap. XII. s. 1. is equally clear on the other, that a deed of separation properly framed will discharge both husband and wife from the performance of one of the cardinal nuptial duties—the duty of cohabitation.

SECTION II.

DEEDS OF SEPARATION.

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Chap. XII. s. 2. AN agreement for the separation of husband and wife is usually by formal deed; but, like other agreements, it may also be by executory articles (e).

Separation
deeds: usual
provisions.

Separation deeds usually contain stipulations with reference to (1) the husband and wife living apart; (2) the property of one or both of the parties; and (3) the custody of the children. Before, however, examining in detail the contents of these deeds, some explanation should be given of the anomaly, that

(e) As in the cases of *Wilson v. Sittart v. Vansittart*, 4 K. & J. 62. *Wilson*, 1 H. L. Cas. 538; *Van-*

a husband and wife were, under the old law, capable of entering into a mutual contract. It will be found that this power of contracting depended on the right to compromise a matrimonial action, which had been either actually commenced, or rendered inevitable by the inharmonious relations of the parties.

Chap. XII. s. 2.
Capacity of
the wife to
contract.

Lord Selborne, L. C., in the most recent case on the subject (*f*), thus explains the difficulty,—

To the general incapacity of husband or wife to sue or to be sued by each other, matrimonial suits between them for a divorce *à mensâ et thoro*, for a dissolution or nullity of marriage, or for restitution of conjugal rights, were (of course) necessary exceptions; and some power to terminate such suits by way of compromise would appear, on sound principles, to have been reasonably incident to the power to institute and to defend them. But the reason founded upon the necessity of such a case goes no further than this, that the parties ought to be capable of coming to an agreement with each other concerning the subject-matter of the suit, so as to make its further prosecution (possibly, also, the institution at a future time of other similar proceedings) unnecessary; and that, if they do so, that agreement must be a good consideration for any other stipulations concerning property which either of them, acting within the limits of his or her general legal competency, may, as part of the same arrangement, make in favour of the other. A husband may contract by a deed or articles of separation to pay an annuity, or to convey property, real or personal, for the benefit of his wife; and a wife may contract to release or transfer for the benefit of her husband real or personal estate settled to her separate use, when there is no restraint on anticipation. These are not matters within the scope of the litigation; but as the husband has full power to contract concerning his own property, and as the wife has full power to contract concerning her separate estate with any stranger, so may they, in consideration of an agreement to compromise a matrimonial suit, contract concerning the same matters *inter se*.—Page 429.

The Lord Chancellor then proceeded to examine the authorities, and deduced from them the three following propositions:—

1. Agreements for separation founded on the compromise of matrimonial suits and differences are not contrary to the policy of the law.
2. The compromise of such suits is a sufficient consideration for such agreements between husband and wife.
3. The wife, so far, at all events, as may be necessary to enable such compromises to be made, is to be regarded as placed towards her husband in the position of a *feme sole*.

(*f*) *Cahill v. Cahill*, 8 A. C. 420.

Chap. XII. s. 2.

Limits of
power to
contract.

A married woman, however, cannot in a separation deed contract concerning her real or personal estate in a manner in which she could not contract with a stranger (*g*). Thus, an attempt to bind her separate property, in respect of which she is restrained from anticipation, or her real estate, or reversionary personalty (not separate), without the observance of the statutory requirements, is futile and void (*h*).

Under the Married Women's Property Act, 1882, a married woman's power to contract is considerably enlarged; and, with the sole exception of property which she is restrained from anticipating, she will henceforward possess the same power of contracting by a separation deed as the husband formerly had. This extended operation of the Act is due partly to its enlarging the amount of her separate property, and partly to the power which has been conferred upon her, of entering into contracts as well with her husband as with a stranger.

Circum-
stances under
which separa-
tion deeds
may be
entered into.

Contracts between husband and wife to live apart from each other are not, as they were at one time considered to be, against the policy of the law, and may be specifically performed (*i*); and specific performance of a covenant not to institute proceedings for restitution of conjugal rights has been enforced by injunction against the husband (*k*). According to the modern practice, the covenant would constitute matter of defence in the Probate and Divorce Division (*l*); and such a defence is equally available when the wife is plaintiff (*m*). And although *pending* proceedings cannot now be restrained by injunction, the husband or wife may be restrained from *instituting* proceedings to compel a return to cohabitation (*n*). If the husband and wife enter into a prospective arrangement for separation at a future time,

(*g*) *Cahill v. Cahill*, 8 A. C. 420. See the speech of Lord Selborne at p. 431, where he limits the generality of Sir G. Jessel's propositions in *Besant v. Wood*, 12 Ch. D. 605.

(*h*) *Cahill v. Cahill*, *ubi supra*. See also *Vansittart v. Vansittart*, 4 K. & J. 62.

(*i*) *Wilson v. Wilson*, 1 H. L. Cas. 538; *Hart v. Hart*, 18 Ch. D. 670.

(*k*) *Hunt v. Hunt*, 4 De G., F. & J. 221.

(*l*) *Marshall v. Marshall*, 5 P. D. 19.

(*m*) *Marshall v. Marshall*, *ubi supra*.

(*n*) *Besant v. Wood*, 12 Ch. D. 605.

the deed is void on the ground of public policy, and cannot be enforced (o). The distinction thus drawn by the Courts, between contracts for an immediate and for a future separation, depends upon the fact, that in the latter case there can be no immediate necessity, and therefore no justification, for entering into such a contract. Chap. XII. s. 2.

A separation deed is generally made between the husband, Form of deed. of the first part, the wife, of the second part, and trustees, of the third part. Trustees were, before the Married Women's Property Act, 1882, essential to the validity of such a deed, for a husband and wife could not covenant with each other; and the objection to these deeds, which at one time prevailed on the ground of public policy, seems to have been overcome by the consideration of the trustees' obligations. "It has always," said Lord Eldon (p), "seemed to me very difficult to hold these deeds legal. It seems to be admitted, that a mere agreement to live separate is one that would not be deemed valid; and it seems strange, as Sir William Grant observes, that if the primary object be vicious, these auxiliary provisions should be held good, and thereby that which the law objects to should be carried into effect" (q).

Under the recent Act it seems that a husband and wife can carry out the arrangement for separation without the intervention of trustees: for they can now enter into mutual covenants, and can convey property to each other (r).

Where property is to be held in trust, trustees will, of course, be added; and, in that event, the covenants of the parties will be entered into not only *inter se*, but with the trustees. It may

(o) *Westmeath v. Westmeath*, 1 Dow. & Cl. 519; *Egerton v. Lord Brownlow*, 4 H. L. Cas. 1; and see *post*, p. 351.

(p) *Westmeath v. Westmeath*, Jac. 126, 142.

(q) See also *Guth v. Guth*, 3 Bro. Ch. C. 614; *Legard v. Johnson*, 3 Ves. 352. The dictum of Sir W. Grant referred to above seems to be

contained in *Worrall v. Jacob*, 3 Mer. at p. 268, where he says, "The object of the covenants between the husband and the trustees is to give efficacy to the agreement between the husband and the wife."

(r) The Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 1; The Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 50.

Chap. XII. s. 2. also be mentioned that, as the authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority, it is terminated by a separation deed (s), and the covenant of indemnity usually entered into by the trustees does not involve them in any serious liability.

According to a common form the deed contains a recital that (t)—

Unhappy differences have arisen between the said A. B. (*the husband*) and C. B. (*the wife*) by reason whereof they have agreed to live separate and to enter into the arrangement intended to be effected by these presents.

“Unhappy differences.”

In *Clough v. Lambert* (u), where the words of the recital were merely that “divers unhappy differences subsisted between the husband and wife, in consequence of which they had agreed to live separate,” Sir Lancelot Shadwell held enough was said; because “there might have been circumstances alluded to by the recital which would have warranted a divorce *à mensâ et thoro*.” It is now, however, quite clear that the grounds, which would warrant a decree for dissolution of marriage or for a judicial separation, are not indispensable to support a deed of separation (x).

The deed then proceeds:—

Covenant by the husband,

that the wife may live separate from him;

and that he will not compel her to cohabit with him or molest her.

Now this indenture witnesseth, that in pursuance of the said agreement and for effectuating the said arrangement, and in consideration of the covenants herein contained, he the said A. B. doth hereby covenant with the said C. B. and also as a separate covenant with the said E. F. and G. H., that notwithstanding her coverture, she the said C. B. may at all times during the life of the said A. B. live separate from him and free from his control and authority, as if she were unmarried; and that he will not in any manner compel, or endeavour to compel, her to cohabit with him, or in any manner molest or interfere with her in any way of living or otherwise, and will not sue or prosecute any person for receiving or assisting her (y).

(s) *Eastland v. Burchell*, 3 Q. B. D. 432.

(t) See Davidson's *Precedents and Forms of Conveyancing*, 3rd ed., Vol. 5, p. 667 *et seq.*; Key & Elphinstone's *Compendium of Precedents*, 2nd ed., Vol. 2, p. 413.

(u) 10 Sim. 174.

(x) See *Sanky v. Golding*, Carey, 124; *Seeling v. Crawley*, 2 Vern. 386; *Head v. Head*, 3 Atk. 547; *Fletcher v. Fletcher*, 2 Cox, 99.

(y) *Rex v. Mead*, 1 Burr. 542; *Rex v. Winton*, 5 Term R. 89.

The above clauses are said to have been devised at a period Chap. XII. s. 2. when the Civil Courts held that a deed of separation altered the legal relations of husband and wife (s). But the decision in *Marshall v. Rutton* (a), in the time of Lord Kenyon, brought the law back to what it had been originally. According to the ruling in that case, no agreement between husband and wife can change their legal character and capacity; and so little did the Courts consider the husband as exonerating the wife from her duty by a deed of separation, that in *Chambers v. Caulfield* (b) it was held by Lord Ellenborough, that such a deed forms no bar to an action of damages by the husband for the wife's seduction (c).

In *Hunt v. Hunt* (d) a husband in a separation deed covenanted with his wife's trustees, who indemnified him against her debts, that he would not compel, or endeavour to compel her to cohabit with him by any legal proceedings or otherwise howsoever. The husband having instituted a suit in the Divorce Court to obtain a restitution of conjugal rights, the wife and her trustees filed a bill in Chancery to restrain him from a breach of his covenant. The Master of the Rolls (Sir John Romilly) dismissed the bill, but the Lord Chancellor (Lord Westbury), on appeal, reversed the decision of the Master of the Rolls, and granted the injunction, holding that such a covenant was valid as part of a deed of separation. Hunt v. Hunt.

The following remarks of the Earl of Selborne, L. C., indicate that in his Lordship's opinion Lord Westbury's decision would have been reversed by the House of Lords if the suit had not unfortunately become abated:—

“ *Hunt v. Hunt* is the only case in which an injunction has been granted at the suit of a wife to restrain a husband from carrying on his suit for restitution of conjugal rights, the husband having covenanted not to endeavour to compel the wife to cohabit with him by any legal proceedings. An appeal to this House from that decision was fully argued; and everything which fell from the Law Lords (except Lord Westbury), in an

(z) See *Corbet v. Poelnitz*, 1 Term Rep. 5, and other cases there referred to.

(a) 8 Term Rep. 545.

(b) 6 East, 244.

(c) See note by Jacob on this point, 2 Rep. 323.

(d) 4 De G., F. & J. 221. See *Williams v. Bailly*, L. R., 2 Eq. 731, and *Brown v. Brown*, L. R., 7 Eq. 185.

Chap. XII. s. 2. unusually strong House, was favourable to the appellant, as I know from having myself argued the case. But Lord Westbury persuaded the House to put some question to the judges, and meanwhile the husband died, so that the case came to an end" (e).

In the case of *Rowley v. Rowley* (f), the question turned upon the meaning of the words "the petitioner undertaking not to institute other proceedings in the Divorce Court," which occurred in an agreement for the compromise of a previous suit; and it was held that the wife was precluded from instituting proceedings in respect of matters which formed the ground of the previous petition, but that the words did not amount to an undertaking never to institute any other proceedings. This decision depended on the construction of particular words, but it is valuable as showing that the Court will ascertain and give effect to the real agreement between the parties.

Deed of separation a defence to an action.

Since the Judicature Act, no injunction can be granted restraining a pending action (g); but the institution of proceedings may be restrained (h). If, however, a wife, who has agreed by a separation deed not to sue her husband for restitution of conjugal rights, institutes a suit in violation of her covenant, the deed may be successfully pleaded by way of defence, although it does not furnish a ground for staying proceedings on an interlocutory application (i).

Deed of separation an answer to a writ of habeas corpus.

A deed of separation is a good answer to a writ of *habeas corpus* sued out by the husband to re-possess himself of his wife (k).

Husband's power over the wife's person.

In former times it was considered that a husband possessed a general power over his wife's personal liberty, and a learned judgment was pronounced by Coleridge, J., in *Re Cochrane* (l), from which it may be collected that a wife, who without cause absented herself from her husband, might then have been recovered by force or stratagem. Now, however, since the Civil

(e) *Cahill v. Cahill*, 8 A. C. 420, 421; see also *Brown v. Brown*, L. R., 7 Eq. 185.

(f) L. R., 1 Sc. & D. 63.

(g) 36 & 37 Vict. c. 66, s. 24 (5).

(h) *Besant v. Wood*, 12 Ch. D.

605.

(i) *Marshall v. Marshall*, 5 P. D. 19.

(k) *Rex v. Mead*, 1 Burr. 542; *Rex v. Winton*, 5 Term Rep. 89.

(l) 8 Dowl. P. C. 630.

Courts adjust all kinds of matrimonial differences, and specifically decree the fulfilment of matrimonial obligations (though how the decree is to be enforced is not easily to be perceived), the husband would not be justified in taking the law into his own hands, and enforcing by compulsory process the obedience of his reluctant wife. Chap. XII. s. 2.

Next usually follows a covenant by the husband with the trustees that the wife may enjoy her property as a *feme sole* :—

And that, notwithstanding her coverture, she may from henceforth hold, take and enjoy, to her separate use, all such real estate as she, or the said A. B. in her right, may hereafter be seised of, and may take and enjoy to her separate use all her articles of personal ornament and dress, and all such personal estate as she now is or hereafter may become in any manner possessed of or entitled to for any estate or interest, or which are or shall in any manner be hers or reputed hers, or which she shall save out of her separate property under these presents or any other instrument already made or hereafter to be made, and may sell, bequeath and dispose of the same real and personal estate by deed or will as she may think proper, without any interference by the said A. B., and free from his debts and engagements (*m*). Covenant for wife's enjoyment of separate property.

The release by the husband of his marital rights to future-acquired property is a good consideration for an annuity granted to him by the wife out of her separate property (*n*).

When the wife has no separate property, there is usually a covenant by the husband with the trustees to pay to them a stated yearly sum for the wife's maintenance. The words are usually as follows :— Provision securing maintenance to the wife.

And the said A. B. doth hereby covenant with the said E. F. and G. H., and also as a separate covenant with the said C. B., that he will, during the joint lives of himself and of the said C. B., pay to the said C. B. the sum of £ per annum by equal quarterly payments on the four usual quarter days, the first payment to be made on the day of , which annuity shall be apportionable at the commencement and termination thereof.

(*m*) If the parties were married after 1882 this clause is unnecessary and may be omitted in reliance on the provisions of the Married Women's Property Act, 1882. If, on the other hand, the marriage took place before 1883, and there are freeholds, leaseholds or chose in action of the wife, not her separate property, they should be vested in trustees for her. See Key & Elph., vol. 2, p. 416.

(*n*) *Logan v. Birkett*, 1 Myl. & K. 220.

Chap. XII. s. 2.

After separation by consent, the wife cannot pledge her husband's credit.

Where a husband and wife separate by mutual consent, and the wife makes her own terms as to her income, her authority to pledge her husband's credit is at an end, even when her income proves insufficient for her support (*o*).

In so deciding, Lush, J., made use of the following observations:—

“Where, however, the parties separate by mutual consent, they may make their own terms; and, so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property, or from the allowance of the husband, or partly from one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add, that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance” (*p*).

The wife's misconduct does not relieve the husband from his covenants.

In the absence of express words limiting the liability of the husband, he will be bound to continue the payment of an annuity, although the wife has committed adultery, and the marriage has been dissolved (*q*). But the Court has power under 22 & 23 Vict. c. 61, s. 5, and 41 Vict. c. 19, s. 3, to treat a separation deed as a post-nuptial settlement, and, where the marriage is dissolved, to alter its provisions (*r*); but it has no such power where only a decree for judicial separation is pronounced (*s*).

Effect of adultery by husband after separation.

The agreement to live apart is not a licence to the husband to commit adultery, and while the arrangement continues, the wife is entitled to no more than what was stipulated for in the deed. But when she has established that her husband has

(*o*) *Eastland v. Burchell*, 3 Q. B. D. 432.

(*p*) 3 Q. B. D. 436.

(*q*) *Charlesworth v. Holt*, L. R., 9 Ex. 38.

(*r*) *Worsley v. Worsley*, L. R., 1 P. & D. 648; *Benyon v. Benyon*, 1 P. D. 447.

(*s*) *Gandy v. Gandy*, 7 P. D. 168.

been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed. Such circumstances justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and, amongst them, to an allowance based on her husband's actual income (*t*). But a wife entitled to an allowance under a separation deed cannot claim alimony *pendente lite* (*u*). Chap. XII. s. 2.

A clause is sometimes inserted providing for the cesser of the annuity in case of the unchastity of the wife; but this has been held not to be a "usual" provision (*x*).

Formerly, an annuity was not apportionable, unless it was expressed to be for the maintenance of the annuitant (*y*), an exception supported by the necessity of the case, and the consequent presumption of the intention (*z*); but under the Apportionment Act, 1870 (*a*), annuities are, like interest on money lent, to be considered as accruing from day to day, and are apportionable in respect of time accordingly.

The wife and her trustees, who are parties to the deed, covenant that she shall in no way molest the husband while separate. This covenant is generally as follows:— Covenant by the wife not to molest her husband.

That the said C. B. (the wife) shall not at any time hereafter molest or disturb the said A. B. (the husband), and shall not in any manner compel or endeavour to compel him to cohabit with her (*b*).

(*t*) Per Sir J. Hannen in *Morrall v. Morrall*, 6 P. D. 100.

(*u*) *Powell v. Powell*, L. R., 3 P. & M. 186. See also *Williams v. Baily*, L. R., 2 Eq. 731.

(*x*) *Hart v. Hart*, 18 Ch. D. 670.

(*y*) *Howell v. Hanforth*, 2 W. Bl. 1016; *Hay v. Palmer*, 2 P. Wms. 501; *Anderson v. Dwyer*, 1 Sch. & Lef. 301; *Sheppard v. Wilson*, 4 Hare, 395; *Leathley v. Trench*, 8 Ir. Ch. Rep. 401.

(*z*) See note to *Ex parte Smyth*, 1 Swanst. 349.

(*a*) 33 & 34 Vict. c. 35; and see, as to the former law, 4 & 5 Will. 4, c. 22.

(*b*) A suit by the wife in the

Divorce Court for a judicial separation appears not to be a breach of this covenant. *Thomas v. Everard*, 6 H. & C. 448. *Secus*, where the suit is for restitution of conjugal rights (*Marshall v. Marshall*, 5 P. D. 19; *Beeant v. Wood*, 12 Ch. D. 605); and such a suit would formerly have been restrained by injunction (*Saunders v. Rodway*, 16 Beav. 207; *Flower v. Flower*, 20 W. R. 231); and since the Judicature Act may be dismissed on the covenant being pleaded. *Marshall v. Marshall*, *ubi supra*. See further as to molestation, *Fearon v. Aylesford*, 12 Q. B. D. 539.

Chap. XII. s. 2. In *Besant v. Wood* (c), a covenant on the part of the trustees with the husband, "in pursuance and performance of the agreement on the part" of the wife, that the said wife should not "by letter or otherwise molest or annoy the husband, or commence or prosecute any suit or other proceedings to compel the husband to cohabit with her" was enforced by injunction restraining the wife from instituting proceedings for restitution of conjugal rights. Sir G. Jessel, M. R., in his exhaustive judgment, examined the previous authorities, and came to the conclusion that a separation deed is "a contract to be properly enforced," and he added :—

"I believe, therefore, that so far as the general law is concerned, though you cannot treat it as settled, but according to my opinion of what is the law and what it ought to be, the remedy is mutual, and the husband as well as the wife is entitled to specific performance of the agreement to live apart" (d).

Covenant for
the husband's
indemnity
against the
wife's debts.

The trustees next covenant for the husband's indemnity against all debts of the wife that may be contracted by her while separate, as follows :—

And further, that she the said C. D. (the wife) and they the said E. F. and G. H., or one of them, their or one of their heirs, executors or administrators, will, at all times hereafter, keep indemnified the said A. B., his heirs, executors and administrators, against all the debts and liabilities which the said C. B. has already contracted or incurred (e), or shall hereafter contract or incur, and against all actions, suits, accounts, claims and demands, costs, charges, losses, damages and expenses in respect of such debts and liabilities, or any of them.

It was well settled, under the old law, that a trustee's covenant to indemnify the husband was a valuable consideration, and took the deed out of the Statute of Fraudulent Conveyances (f).

(c) 12 Ch. D. 605.

(d) *Ibid.* p. 625. See also *Sanders v. Rodway*, 16 Beav. 207; *Flower v. Flower*, 20 W. R. 231.

(e) In *Summers v. Ball*, 8 Mee. & W. 596, the indemnity was held to extend to debts incurred by the wife while living with her husband. The indemnity ought to include every-

thing short of criminal conduct for which the wife is answerable in her own person. *Hyde v. Price*, 3 Ves. 437, 445.

(f) *Stephens v. Olive*, 2 Bro. C. C. 90; *Worrall v. Jacob*, 3 Mer. 256, 269; *Jee v. Thurlow*, 2 Barn. & C. 547; *Wellesley v. Wellesley*, 10 Sim. 256.

And although a wife, after a separation by mutual consent, Chap. XII. s. 2. has no authority to pledge her husband's credit (*g*), still there may be liabilities on the part of the husband, even under the Act of 1882, which would be sufficient to import consideration. Thus, for example, he might be sued after separation in respect of his wife's ante-nuptial debts, or torts, (*h*), or he might be liable to the parish for her maintenance if she became a pauper (*i*), and, as the amount of consideration is not material, the possibility, however remote, of being called upon to re-imburse the husband will be sufficient to prevent the deed from being treated as voluntary (*k*).

The execution of a deed of separation by the husband, is a legal and sufficient consideration for a promise by a third party to pay debts and expenses incurred by the wife, for which the husband is liable (*l*).

The last clause usually found in a deed of separation, is one which provides that its provisions shall wholly cease in the event of the husband and wife resuming cohabitation (*m*). The terms of this clause are as follows:—

Provision that on renewal of cohabitation the deed shall be void.

Provided always, &c., that in case the said A. B. and C. B. shall be reconciled to each other and cohabit together, or if their marriage shall be dissolved by any court of competent jurisdiction in respect of anything done or suffered by either party after the execution of these presents, then and in either of the said cases the covenants, agreements and provisions herein contained shall forthwith be void, except in respect of any sale or disposition or other act previously made or done, and of proceedings for a breach of the said covenants and provisions previously committed.

According to some forms, this clause is omitted on the ground that a renewal of cohabitation will of itself vacate the deed (*m*), but it seems expedient to insert it, since otherwise it becomes a

(*g*) *Eastland v. Burchell*, 3 Q. B. D. 432.

(*h*) See *Head v. Briscoe*, 5 C. & P. 484.

(*i*) *Hyde v. Price*, 3 Ves. 437, 445.

(*k*) See *Wolstenholme & Turner's Conveyancing Acts*, p. 7, 3rd ed., where the contrary is stated.

(*l*) *Jones v. Waite*, 5 Bing. N. C. 341.

(*m*) *Durant v. Titley*, 7 Price, 577; *Fletcher v. Fletcher*, 2 Cox, 99; *Hindley v. Marquis of Westmeath*, 6 Barn. & Cress. 200; *Marquis of Westmeath v. Marchioness of Westmeath*, 1 Dow & Clark, 519; *Jee v. Thurlow*, 2 Barn. & Cress. 547.

Chap. XII. s. 2. question of intention, to be gathered from all the provisions of the deed, whether it is to have any operation in the event of a reconciliation. Thus, where the deed contained provisions beyond the purview of a mere separation deed, it was held that it could be supported after a return to cohabitation as a valid settlement (*n*). A clause providing for the renewal of cohabitation in a separation deed, executed on the occasion of "unhappy differences" between a man and his deceased wife's sister, will be rejected, since the parties can never legally live together as husband and wife (*o*).

What will constitute a renewal of cohabitation.

What shall constitute a renewal of cohabitation, so as to come within the terms and meaning of this clause, may be a question. Casual meetings in society, it is presumed, will not have this effect (*p*); and it is doubtful whether forgiveness, or even the interchange of expressions of conjugal affection and tenderness, by letter, or otherwise, will put an end to the deed; because the physical separation may still continue, and be kept up advisedly (*q*).

The terms of this clause are such as to require both reconciliation and a renewal of cohabitation in order to avoid the deed; but if there be subsequent cohabitation, the Court will, in the absence of special circumstances, presume that a reconciliation has taken place. "Living, however, under the same roof"—adopting the language of Lord Eldon (*r*)—"in a state of the highest animosity," will not amount to a reconciliation, or avoid the separation deed under this clause; and, on the other hand, a correspondence by letter showing that "no hostility remained" will not indicate a waiver or abandonment of the contract (*s*).

(*n*) *Ruffles v. Alston*, L. R., 19 Eq. 539.

(*o*) *Ex parte Naden*, L. R., 9 Ch. 670.

(*p*) See *Wilson v. Mushett*, 3 Barn. & Adol. 743; and *Slatter v. Slatter*, 1 You. & Coll. Ex. 28; *Randle v. Gould*, 6 W. R. 108.

(*q*) It is related of a late eminent conveyancer that he used to introduce into deeds of separation a clause, which he called the "five

minutes' clause," whereby he provided, that if the husband and wife should at any time be together for five minutes, after either of them had requested the other to depart, the deed should instantly become void!

(*r*) *Bateman v. Ross*, 1 Dow, 235, 245.

(*s*) *Frampton v. Frampton*, 4 Beav. 287.

SECTION III.

MISCELLANEOUS POINTS AS TO DEEDS OF SEPARATION.

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IN Lord Hardwicke's time, it would rather appear that *prospective* arrangements for the separation of husband and wife were not deemed necessarily void. That great judge himself did not expressly condemn them (*t*). And in *Rodney v. Chambers* (*u*), Mr. Justice Le Blanc said, there was no satisfactory reason why an agreement to separate *de futuro* should be bad, if an agreement *de præsenti* for the same purpose should be good. However, the distinction has been taken, and is still maintained on grounds of policy. Accordingly, in *Westmeath v. Westmeath* (*x*), the House of Lords expressed a clear opinion, that a deed providing for a future separation could not be supported. The same conclusion seems derivable from *Vandergucht v. De Blaquiére* (*y*), before Lord Chancellor Cottenham, although the precise point was not raised in that case.

Chap. XII. s. 3.
Prospective
arrangements
for separa-
tion.

Since the decision in *Vandergucht v. De Blaquiére* numerous cases (*z*) have come before the Courts of Equity on this point,

(*t*) *Moore v. Moore*, 1 Atk. 277; West, 35, 43. See also *Lord Vane's case*, 13 East, 171, n.; and *Hoare v. Hoare*, 2 Ridg. P. C. 268.

(*u*) 2 East, 283, at p. 297.

(*x*) 1 Dow & Clark, 519.

(*y*) 5 Myl. & Cr. 229.

(*z*) *Egerton v. Lord Brownlow*, 4 H. L. Cases, 1; *Cartwright v. Cartwright*, 3 De G., M. & G. 982; *H. v. W.*, 3 Kay & J. 382; *Merryweather v. Jones*, 4 Giff. 509; *Procter v. Robinson*, 14 W. R. 381.

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and it may now be considered as clearly decided, that a deed *tending* to the future separation of husband and wife is void on grounds of public policy, though a deed providing a fund for the wife's support on the occasion of an immediate separation will be held valid (a).

Domestic forum to decide when separation should take place.

In *Rodney v. Chambers* (b), the Court of King's Bench held that the husband's covenant to allow his wife a separate maintenance, in case a separation should take place with the *approbation of the trustees*, was a legal and valid covenant. The principle of this decision was explained by Mr. Justice Lawrence in the following terms:—

We thought that there was nothing illegal in the parties agreeing to refer the question as to what was a good cause of separation to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. We, therefore, only decided that a covenant for separation with the consent of the trustees was good. Not that a covenant was good *generally* that a wife might separate from her husband whenever she pleased; for that would be to make the husband tenant at will to the wife of his marital rights.

Proviso that the trusts shall continue though cohabitation be renewed.

There seems to be nothing to prevent the insertion of a clause declaring that the trusts and covenants for payment shall continue, notwithstanding the renewal of cohabitation. Thus, in *Wilson v. Mushett* (c), Mr. Justice Littledale said,—

The proviso that the trusts shall continue, though the parties live together again, only means that the husband intends to secure to the wife, or her separate use, the property settled by the deed, as he might have done originally on their marriage.

A deed of separation may make a permanent settlement of the husband's property, giving the wife a future interest, and containing provisions for the benefit of children (d).

Separation a good consideration for a promise to pay.

In *Jones v. Waite* (e), it was held that a promise to pay money, upon condition that the promisee would execute a deed of

(a) *Jee v. Thurlow*, 2 B. & C. 547; *Jones v. Waite*, 4 Man. & Gr. 1104; 5 Bing. N. C. 341. *Semble*, a covenant before marriage that in case of any separation taking place between the husband and wife, the husband shall make a certain provision for his wife is void. *Cocksedge*

v. Cocksedge, 14 Sim. 244. See also 5 Hare, 397.

(b) 2 East, 283.

(c) 3 Barn. & Adol. 743. See *Ex parte Naden*, L. R., 9 Ch. 670.

(d) *Worrall v. Jacob*, 3 Mer. 256.

(e) 4 Man. & Gr. 1104.

separation, was a promise not void for illegality of consideration. Chap. XII. s. 3.
 A deed of separation had been drawn up, but not executed by the husband. To induce him to execute the deed, a third party undertook to pay his debts. It was held by the House of Lords, that the consequent execution of the instrument by the husband formed a good consideration for the agreement, and entitled him to enforce it (*f*).

A deed of separation is *prima facie* valid. The Court does not presume illegality (*g*). Deed presumed valid.

The question whether a separation deed is voluntary, or for valuable consideration, depends chiefly on the provisions which it contains with respect to property and debts; for although, as has been already stated (*h*), the compromise of a matrimonial action, or threatened action, is a sufficient consideration to support an agreement to live separate, as between husband and wife, it has never been decided that such a compromise imported a valuable consideration into a separation deed, as against creditors and purchasers. What will constitute valuable consideration.

A covenant by the trustees to indemnify the husband against the debts of the wife, although such a covenant involves a mere *scintilla* of liability, is considered to be a valuable consideration (*i*), even when the covenant is conditional and executory (*k*); but the covenant is not an essential part of a separation deed (*l*).

But a deed which does not contain such an indemnity, and is not founded on valuable considerations, though binding on the parties, will be void against creditors and purchasers (*m*). Where no valuable consideration void against creditors and purchasers.

When, however, such a deed is supported by valuable consideration, it will, like other post-nuptial settlements, be good against creditors and purchasers. The Court will "not weigh the consideration in too nice scales" (*n*). Thus, the How far deed good against creditors and purchasers.

- (*f*) 9 Cl. & Fin. 101. See also 256.
Clough v. Lambert, 10 Sim. 174. (*l*) *Frampton v. Frampton*, 4 Beav. 287.
 (*g*) *Jones v. Waite*, 9 Cl. & Fin. 101.
 (*h*) *Ante*, p. 339. (*m*) *Fitzner v. Fitzner*, 2 Atk. 511;
 (*i*) *Stephens v. Olive*, 2 Bro. C. C. 90; *Worrall v. Jacob*, 3 Mer. 256; *Clough v. Lambert*, 10 Sim. 174;
Gibbs v. Harding, L. R., 5 Ch. 336. *Cowx v. Foster*, 1 J. & H. 30.
 (*k*) *Wellesley v. Wellesley*, 10 Sim. (*n*) Per Lord Hardwicke, in *Fitzner v. Fitzner*, *supra*.

Chap. XII. s. 3. relinquishment by the wife of her claim to alimony in the Ecclesiastical Court (*o*) would appear to be a valuable consideration; though this point has not been actually decided (*p*).

Executory
articles of
separation.

A Court of Equity will enforce executory articles of separation, when such articles affect property (*q*).

Where deed
destroyed.

In *Seagrave v. Seagrave* (*r*), a husband executed a bond to a trustee for the wife, for payment to her of a weekly allowance, she being separated from him. The bond was destroyed by the trustee, with the husband's privity. The wife sought relief in equity. Sir W. Grant said,—

What is the extent of the relief necessary? The plaintiff has obtained a discovery—an admission that the bond is destroyed. According to modern doctrine, therefore, an action upon the bond will lie without *proferri*. All, therefore, that the plaintiff seems to require is, that she may be at liberty to bring that action in the name of her trustee; and that is all therefore that I shall decree.

Wife's
adultery.

The wife's subsequent adultery (*r*), or even the dissolution of the marriage in consequence of her misconduct (*s*), is no bar to her remedies under a deed of separation. But the Court has, under the Divorce and Matrimonial Causes Acts, power to deal with separation deeds as settlements (*t*).

If the wife makes, on the occasion of the separation, a fraudulent representation to her husband with reference to her past conduct, whereby he is induced to execute the deed, it cannot be relied upon as a condonation; and *semble*, it is incapable of being enforced by the guilty wife (*u*).

(*o*) *Hobbs v. Hull*, 1 Cox, 445.
See *Nunn v. Wilmore*, 8 T. R. 521;
Frampton v. Frampton, 4 Beav. 287.
(*p*) *Jodrell v. Jodrell*, 9 Beav.
45, and *Wilson v. Wilson*, 1 H. L.
Cas. 538.

(*q*) *Wellesley v. Wellesley*, 10 Sim.
256; *Wilson v. Wilson*, 14 Sim. 405;
1 H. L. Cas. 538; *Gibbs v. Harding*,
L. R., 5 Ch. 336.

(*r*) 13 Ves. 439, at p. 444.

(*s*) *Charlesworth v. Holt*, L. R.,
9 Ex. 38.

(*t*) 22 & 23 Vict. c. 61, s. 5; 41

& 42 Vict. c. 19, s. 3. *Worsley v. Worsley*, L. R., 1 P. & M. 648; *Benyon v. Benyon*, 1 P. D. 447. In *Charlesworth v. Holt*, *ubi supra*, it was doubted whether the earlier Act applied to deeds made before it was passed; while in *Ansdell v. Ansdell*, 5 P. D. 138, a retrospective operation was given to the Act of 1878, the decree absolute not having been made till after the Act. See also *Yglesias v. Yglesias*, 4 P. D. 71.

(*u*) *Brown v. Brown*, L. R., 7 Eq. 185.

The provision for the wife, by deed of separation, does not necessarily affect her right to a share of the husband's personal estate under the Statute of Distributions (x); nor apparently any other legal right to which she may be entitled on the death of her husband.

Chap. XII. s. 3.

 Her claim
 under the
 Statute of
 Distributions.

When there are children of the marriage, it is usual to provide in separation deeds for their custody, maintenance and education, a subject which is treated incidentally in the next chapter.

(x) *Slatter v. Slatter*, 1 You. & Coll. Ex. 28.

CHAPTER XIII.

THE CUSTODY, EDUCATION AND MAINTENANCE OF CHILDREN.

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Chap. XIII.

Rights and liabilities of parents.

A TREATISE on the law of husband and wife can scarcely be regarded as complete, without a chapter on the rights and liabilities of the parents with respect to the children of the marriage. The consideration of these rights and liabilities will conveniently fall under the following heads:—

I. During cohabitation.

II. After separation.

III. After the death of the husband.

I. *The rights and liabilities during cohabitation.*

Courts having jurisdiction.

Before the passing of the Judicature Act, 1873 (*a*), the Court of Chancery had exclusive jurisdiction in the matter of infants. By that statute all the Divisions of the High Court possess a concurrent jurisdiction (*b*), in the exercise of which

(*a*) 36 & 37 Vict. c. 66.

(*b*) 36 & 37 Vict. c. 66, s. 34, and R. S. C. 1883, Ord. LV. r. 25.

the rules of equity are to prevail (*c*). Particular subjects are, Chap. XIII. however, assigned to the several Divisions, and among others the wardship of infants and the care of infants' estates are assigned to the Chancery Division (*d*).

It is not usual to provide by ante-nuptial settlements for the custody, education, or maintenance of the children of the marriage, there being fortunately, in the majority of cases, complete unanimity on the part of the husband and wife in respect of these important matters. When, however, dissensions arise or the parents belong to different religions, the children not unfrequently become the occasion of quarrel, and acrimonious litigation. While the husband and wife continue to live together, no question can arise as to the custody or maintenance of the children; but their education, and especially their religious education, may excite dissension between the parents, and result in their separation, or in an appeal to the Courts for a legal adjustment of their differences.

By the common law of England, the wife, in all that relates to the education of children, is completely subordinated to her husband. His authority is in all cases paramount, and it is contrary to the policy of the law, that he should bind himself to relinquish any part of that authority (*e*). Thus, it is completely established that an ante-nuptial promise by the father, that the children of the marriage shall be brought up in a religion different from his own, is not binding (*f*).

The law will not allow him to fetter his judgment as to what will be best for the interests of his children; and, therefore, the most solemn agreement that they shall be brought up in the religion of the wife may immediately after the marriage be repudiated by the husband, even though she consented to the

(*c*) *Re Goldsworthy*, 2 Q. B. D. 75.

(*d*) 36 & 37 Vict. c. 66, s. 25 (10).

(*e*) *Vansittart v. Vansittart*, 2 De G. & J. 249.

(*f*) Per Malins, V.-C., in *Re Agar-Ellis*, 10 Ch. D. 49. In this case it was stated by James, L. J., that "on principle and authority the ante-nuptial promise is, in point of law, absolutely void." This is

scarcely consistent with the opinion of Mellish, L. J., expressed in *Andrews v. Salt*, L. R., 8 Ch. 622, at p. 637, that in considering whether the father had waived or abandoned his rights, such a promise "is a circumstance to which weight, and, perhaps, great weight, ought to be attached."

Education of children.

Right of husband to control their education.

Not bound by ante-nuptial promise.

Chap. XIII. marriage solely on the faith of that agreement. "As between the husband and the wife, the question is to be determined as if there had never been any such promise, and just as if she or her husband had embraced a new faith after the marriage" (g).

Nor by acquiescence. No amount of acquiescence will bind a father to allow his children to be brought up in accordance with such a promise; for although they may have imbibed distinctive religious impressions which it may be injurious to change, yet the father "as king and ruler in his own family" has a right to decide that question for himself (h). But after the death of the father the question of acquiescence becomes important (i).

But the Court will interfere in the interests of the children. In the interests of the children, however, the Court has frequently interfered to protect them from abuse of the parental power.

"The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt the law may take away from him this right, or may interfere with his exercise of it, just as it may take away his life, or his property, or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But in the absence of some conduct by the father entailing such forfeiture, or amounting to such abdication, the Court has never yet interfered with the father's legal right" (k).

Although the forfeiture or abdication referred to by Lord Justice James in this passage, is not very closely connected with the relations of husband and wife, it may be convenient, in this place, to enumerate the leading authorities for the several propositions which are implied in the above statement.

In cases of—
i. Moral turpitude. The father may be deprived of the custody of his children if his conduct is so immoral that it would contaminate the children (l),

(g) Per Sir W. M. James, L. J., in *Re Agar-Ellis*, 10 Ch. D. 49, 71. See also on the subject of antenuptial promises, *Re Browne*, 2 Ir. Ch. Rep. 151; *Hill v. Hill*, 10 W. R. 400; *Re Meades' Minors*, Ir. L. Rep., 5 Eq. 98; *Andrews v. Salt*, L. R., 8 Ch. 622.

(h) See *Re Agar-Ellis*, 10 Ch. D. 75.

(i) *Post*, p. 372.

(k) Per Sir W. M. James, L. J., in *Re Agar-Ellis*, 10 Ch. D. 72.

(l) *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Swift v. Swift*, 34 Beav. 266; 4 De G., J. & S. 710.

or if he has been guilty of ill-treatment and cruelty towards them (*m*). Where the father was a person of intemperate and vicious life, and in the habit of using gross and disgusting language, as well as personal violence, to his wife, the Court declined to grant him a writ of *habeas corpus* to remove the child (a boy of nine years) from unobjectionable custody (*n*). Speculative opinions, of whatever kind they may be, do not, in the eye of the law, disqualify a father from having the custody of his child; but it seems that if the opinions are grossly immoral or irreligious, and are not only held but inculcated, the Court will not, considering the material interests of the infant, allow it to be brought up in a manner likely to work utter ruin to the child (*o*). Chap. XIII.

The legal right of a father to the custody of his children may, under certain circumstances, be abandoned by him. That is to say, he may, by acquiescing for a long time in their being brought up by persons of superior wealth and social position, preclude himself from reclaiming the children. Thus, where the father had no means of educating the children in a manner suitable to their fortune, where they had been for ten years out of his custody, and had moved in a society higher than that which he enjoyed, the Court declined to order the children to be delivered up to him (*p*). ii. Abandonment.

The third case (*q*) in which the Court will actively interfere against a father's right to the control of his children, is when he seeks to remove them, being wards of Court, out of the jurisdiction. In such a case the Court has to act upon suspicion, and there is considerable difficulty in interposing effectively; but it seems that the Court may either grant an injunction to restrain the father from removing the child, requiring him iii. Removal of ward out of jurisdiction.

(*m*) *Whitfield v. Hales*, 12 Ves. Sm. 758, and the remarks of Jessel, 492; *Rex v. Greenhill*, 4 Ad. & E. M. R., in *Re Besant*, 11 Ch. D. 513.

624. (*p*) *Lyons v. Blenkin*, Jac. 245. See also *Powel v. Cleaver*, 2 Br. C. C. 499; *Creuze v. Hunter*, 2 Cox, 242.

(*n*) *Re Goldsworthy*, 2 Q. B. D. 457. (*q*) See *Re Agar-Ellis*, 24 Ch. D.

(*o*) See *Shelley v. Westbrook*, Jac. 317. 266; *Thomas v. Roberts*, 3 De G. &

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Custody:
remedies of
the father.

at the same time to give security; or else it may remove the child from the custody of the father (*r*).

If a child is out of the custody of its father, his remedy for its recovery is either to obtain a writ of *habeas corpus*, or to constitute the child a ward of Court, which is usually done by settling a small sum of consols for the benefit of the infant and then bringing an action for its administration (*s*); but the existence of property is not a condition precedent to the exercise of the jurisdiction (*t*). In proceedings under writs of *habeas corpus* the question always is whether the person is in illegal custody without his consent; and the Court, when a child is brought up on such a writ and is of age to consent—that is to say, fourteen in the case of boys, and sixteen in the case of girls—will always inquire whether it does or does not consent to remain in its present custody. If the child consents to remain where it is, the ground of the application falls away, and no order can be made on the return of the writ (*u*).

The jurisdiction of equity in relation to guardianship is not fettered by the considerations which apply to writs of *habeas corpus*; and, though in particular cases there may be practical difficulties in handing over to a father the custody of a reluctant child, yet the law of England, according to Sir W. B. Brett, M. R. (*x*), is that “the father has the control over the person, education and conduct of his children until they are twenty-one years of age.”

Maintenance:
liability of
parents, how
enforced.

Both parents are now, by law, equally liable for the maintenance of their children (*y*); but this natural and moral obligation

(*r*) *De Manneville v. De Manneville*, 10 Ves. 52; *Re Plombley*, 47 L. T. 283.

(*s*) See as to constituting an infant a ward of Court, Seton on Decrees, p. 722; Simpson on Infants, 223; *De Pereda v. De Mancha*, 19 Ch. D. 451.

(*t*) *Re Fynn*, 2 De G. & Sm. 457; *Re Spence*, 2 Ph. 247; *Brown v. Collins*, 25 Ch. D. 56. See, however, the observations of Cotton, L. J., in *Re Agar-Ellis*, 24 Ch. D. 332.

(*u*) *Re Agar-Ellis*, 24 Ch. D. 317; see p. 326. When the infant has not attained years of discretion, its wishes will not be consulted. *Reg. v. Clarke*, 7 E. & B. 186.

(*x*) *In re Agar-Ellis*, 24 Ch. D. at p. 326.

(*y*) The father's liability depends upon the statute 43 Eliz. c. 2, and that of the mother upon the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 21.

can only be indirectly enforced either by the action of the parish authorities, or by criminal proceedings (ε); and no means exist, where the child has been voluntarily supported by a stranger, of recovering from its parents the cost of its maintenance. If the child becomes chargeable to the union, the guardians can recover from the parents the cost of maintaining it in the work-house. And if the neglect of the parents to supply the child with the necessities of life is sufficiently aggravated, the parents become liable to prosecution. Thus by the Poor Law Amendment Act, 1868 (a), it is enacted that when any parent shall wilfully neglect to provide adequate food, clothing, medical aid or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be liable on summary conviction to six months' imprisonment, with or without hard labour. The punishment of the parent, however, does not supply a very efficacious protection to the child.

When infants are entitled to property, the Court will not apply any part of such property for their maintenance, if the father is living and competent to maintain them (b). His competence, however, is measured by the social position and expectations of the children, and an allowance has been made to assist a father who had an annual income of 6,000*l.* (c). In another case (d) a testator left property to the value of 10,000*l.* a year to be accumulated for twenty-one years, and directed the accumulations to be laid out in the purchase of land to be held in trust for Sir H. Havelock (who was about fifty years of age at the date of the will) for life, and afterwards for his eldest son for life and his first and other sons in tail; and in default of

Maintenance sometimes allowed to father out of infant's property.

(z) "It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless indeed the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation." Per Cockburn, C. J., in *Bageley v. Forder*, L. R., 3 Q. B. 559, 565.

See also *Cooper v. Martin*, 4 East, 76; *Urmston v. Newcomen*, 4 Ad. & E. 899; *Mortimore v. Wright*, 6 Mees. & W. 482.

(a) 31 & 32 Vict. c. 122, s. 37.

(b) *Jackson v. Jackson*, 1 Atk. 513.

(c) *Jervoise v. Silk*, 1 G. Coop. 52.

(d) *Havelock v. Havelock*, 17 Ch. D. 807.

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issue of the eldest son, in trust for the second son and his issue in similar terms, with divers limitations over. As Sir H. Havelock possessed only a moderate income, Vice-Chancellor Malins directed a sum of 2,700*l.* per annum to be allowed to him for the benefit of the infants.

A father is entitled, whether of independent means or not, to the income of a fund when there is an absolute trust to apply the *whole* income, and not merely such part as the trustees shall think fit, towards the maintenance of the children (*e*). And where there is a trust for maintenance in a marriage settlement, and the father has maintained the children without calling for contribution from the fund, he has been held to be, on the ground of contract, in the position of a purchaser of so much of the fund as it would have been proper to apply in maintenance (*f*).

Discretionary
power in trust-
tees.

Where a discretionary power as to maintenance is vested in trustees, the Court will not interfere with their discretion if it be fairly and honestly exercised (*g*). In several cases, however, the Court has controlled an improper or unsound, as opposed to a dishonest, exercise of such a discretion (*h*). On the other hand, an "absolute discretion and uncontrollable authority," or an "uncontrolled and irresponsible discretion" will not, in the absence of *mala fides*, be reviewed by the Court, even where it is of opinion that the trustees are not acting judiciously (*i*).

Ability of
mother.

The ability of the mother to maintain her children was not formerly regarded by the Court in questions relating to maintenance, either during the lifetime of the father (*k*), or after his death (*l*); but it may be doubtful whether, under the new law,

(*e*) *Berkeley v. Swinburne*, 6 Sim. 613; *Stocken v. Stocken*, 4 My. & Cr. 95; *Meacher v. Young*, 2 My. & K. 490. *Secus*, where there is only a power, *Thompson v. Griffin*, Cr. & Ph. 317.

(*f*) *Mundy v. Earl Howe*, 4 Bro. C. C. 223, a case which has been criticized, disapproved, and followed. See *Ransome v. Burgess*, L. R., 3 Eq. 773; *Re Kerrison's Trusts*, L. R., 12 Eq. 422; *Wilson v. Turner*, 22 Ch. D. 521.

(*g*) *Costabadie v. Costabadie*, 6 Hare, 410.

(*h*) *In re Hodges*, 7 Ch. D. 754; *In re Roper's Trusts*, 11 Ch. D. 272.

(*i*) *Gisborne v. Gisborne*, 3 A. C. 300; *Tabor v. Brooks*, 10 Ch. D. 273. See also *Tempest v. Lord Camoys*, 21 Ch. D. 571; *In re Weaver*, *ibid.* 615.

(*k*) *Haley v. Bannister*, 4 Mad. 275.

(*l*) *Douglas v. Andrews*, 12 Beav. 310.

which renders her liable to maintain her children, her ability to do so will not be taken into account in the same manner as that of the father. Chap. XIII.

Trustees have now full power to apply the income of property held by them for an infant on any contingency for his or her benefit; for, by the 43rd section of the Conveyancing and Law of Property Act, 1881 (*n*), which applies only, if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, it is enacted as follows:— 44 & 45 Vict. c. 41.

Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

Applications to the Court as to the guardianship and maintenance or advancement of infants are now made by summons at chambers (*o*).

II. *The rights and liabilities after separation.*

A separation deed, when there are any infant children who are to be handed over to their mother's custody, should fix the age at which such custody shall cease; and, if necessary, should make provision for the maintenance of the children. The terms, also, on which the father shall have access to them, the schools to which they shall be sent, and the manner in which the vacations shall be spent, ought to be expressly defined. Separation deeds: provisions as to custody of children.

It was formerly considered that a provision in a separation deed, whereby the children were to be placed entirely in the custody of the mother, was void on the ground of public policy; for an agreement whereby a father bound himself not to act upon his own judgment for the benefit of his children without the consent of his wife, was held to be repugnant to his parental duty (*p*). When formerly void.

(*n*) 44 & 45 Vict. c. 41.

(*o*) R. S. C. 1883, Ord. LV. r. 2 (12).

(*p*) *Vansittart v. Vansittart*, 4 K. & J. 62; 2 De G. & J. 249. See also *Hope v. Hope*, 8 De G., M. & G. 731; *Walrond v. Walrond*, John. 18.

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Specific performance.

And, accordingly, specific performance of an agreement, which contained such a stipulation, was on this ground refused, although if the deed had been executed, the insertion of such a provision would not have made it wholly void (*q*). But an agreement entered into on the occasion of a separation, whereby the husband bound himself to secure an annuity for the maintenance of his wife and child, has been specifically enforced by the Court (*r*). An agreement under which the husband delegated to trustees the disposal of the children during their school vacations has also been enforced (*s*).

36 Vict. c. 12. By an Act to amend the law as to the custody of infants (*t*), it is enacted that no agreement contained in any separation deed, made between the father and mother of an infant or infants, shall be held to be invalid, by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; and it is also thereby provided that no Court shall enforce any such agreement, if it shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.

This enactment, which was passed in consequence of the decisions in *Hope v. Hope* and *Vansittart v. Vansittart*, now enables the Court specifically to perform an agreement for separation, one term of which is that the wife shall have the custody of the children (*u*).

It seems that a provision that the husband shall pay an annuity to the wife "for herself and child or children, she to maintain the child or children," will be construed as an agreement that she shall have the custody of the children (*x*). On the other hand, an agreement that the deed shall contain "all usual terms as to access to children, &c." is limited to access, and a clause giving the mother the custody of the children will be struck out (*y*).

(*q*) *Vansittart v. Vansittart*, 4 K. & J. 62; 2 De G. & J. 249.

(*r*) *Gibbs v. Harding*, L. R., 5 Ch. 336.

(*s*) *Hamilton v. Hector*, L. R., 6 Ch. 701.

(*t*) 36 Vict. c. 12, s. 2.

(*u*) *Hart v. Hart*, 18 Ch. D. 670.

(*x*) *Hart v. Hart*, *supra*.

(*y*) *Evershed v. Evershed*, 30 W. R. 732. Both these cases may be consulted as to the power of the court to settle the deed, notwithstanding an arbitration clause.

The cases in which a separation has taken place without any provision having been made for the custody of the children, have now to be considered.

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Where no clause as to custody of children.

In a recent case, Sir G. Jessel, M. R., said: "Before the passing of the Act commonly known as *Serjeant Talfourd's Act* (z), there is no doubt that you could not take away the custody of a child from its father, except you showed that either he was unfit to remain the custodian of the child, or that his so remaining would be an injury to the child" (a).

That Act, however, conferred upon the Court of Chancery a discretionary power as to the custody of an infant under the age of seven years who was in the sole custody or control of its father. By the Act to amend the Law as to the Custody of Infants (b), *Serjeant Talfourd's Act* was repealed, and was re-enacted in wider terms as follows:—

36 Vict. c. 12.

Sect. 1. "From and after the passing of this Act(c) it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants, at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court shall direct; and further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said Court shall deem proper."

The object with which these Acts were passed was that a wife might not be precluded from seeking justice from her husband by the terror of that power, which the law gave to him, of taking her children from her: that she might, in fact, be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother (d).

Policy of the Acts.

In administering the Act, the Court is bound to have regard, first, to the paternal right; secondly, to the marital duty; and, Principles on which the Court acts.

(z) 2 & 3 Vict. c. 54.

(c) 24th April, 1873.

(a) *Re Taylor*, 4 Ch. D. 157, 159.

(d) See *Warde v. Ward*, 2 Phil.

(b) 36 Vict. c. 12.

786.

Chap. XIII. thirdly, to the interest of the children (*e*). That is to say, it will recognize the exclusive rights of the father as they existed at common law, and interfere with them only so far as may be necessary to give effect to the objects of the Act. The fulfilment of the marital duty is the condition on which the paternal right is recognized, and, lastly, assuming that the father has been guilty of misconduct, the Court has to inquire, in the interest of the child, whether it will be better cared for, in the custody of the father, or in that of the mother.

There is, of course, no jurisdiction to make an order under the Act, when the infant is over sixteen years of age (*f*). But, under the former Act, where some of the children were over, and some under, the age of seven years, the Court ordered the former, as well as the latter, to be delivered to the mother, in order to avoid "the great evil and danger to the children of separating one portion of the family from the other" (*g*). If the children are in the actual custody of the father, it seems to require a stronger case to justify the Court in interfering than if they are in the custody of the mother, or of a stranger (*h*).

The order, when made, generally provides that the child shall be in the custody of its mother until further order, and also that the father shall be allowed free access to the child at all reasonable times (*i*).

If the wife leaves her husband without sufficient cause (*k*), or has no adequate income (*l*), or has been proved to have misconducted herself (*m*), the Court will, as a rule, decline to deliver the children to her.

By the Divorce and Matrimonial Causes Act, 1857 (*n*), it is enacted that "in any suit or other proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on

Power of
Court under
20 & 21 Vict.
c. 85, and
22 & 23 Vict.
c. 61.

(*e*) *Re Halliday's Estate*, 17 Jur. 56; *Re Taylor*, 4 Ch. D. 157; *Re Elderton*, 32 W. R. 227.

(*f*) *Re Agar-Ellis*, 24 Ch. D. 317, 330.

(*g*) *Warde v. Warde*, 2 Phil. 786; see, however, *Symington v. Symington*, L. R., 2 H. L. Sc. 415.

(*h*) *Re Elderton*, 32 W. R. 227.

(*i*) *Re Taylor*, 4 Ch. D. 157.

(*k*) *Re Taylor*, 11 Sim. 178. It is not, however, necessary for the wife to show that she is entitled to a divorce or judicial separation. *Ex parte Bartlett*, 2 Coll. 661.

(*l*) *Shillito v. Collett*, 8 W. R. 683.

(*m*) *Re Winscom*, 2 H. & M. 540.

(*n*) 20 & 21 Vict. c. 85, s. 35.

any petition for dissolving a marriage, the Court may from Chap. XIII. time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of such suit or other proceeding; and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery;" and by the amending Act (o), this power has been extended, so as to enable the Court to make orders upon petition after the final decree has been pronounced.

Acting under these sections, the Court is guided by the same principles as when it proceeds under its general jurisdiction, regarding, in the first place, the paternal right, then the marital duty, and thirdly the interest of the children.

The Court follows the same principles as when acting under its general jurisdiction.

"When parents cease to live together, the legal right to the custody of children of this age (eight and ten) is with the father. But the Court has power to infringe upon this right, and, when the common home has been broken up by the conduct of the father, it frequently exercises its power in favour of the injured mother" (p). Thus, where the conduct of the wife has been blameless, the custody of the children has been in several cases confided to her (q). But the rule is not an inflexible one, and the Court has the widest and most general discretion, and must consider "all the circumstances of the particular case before it; the circumstances of the misconduct which leads to a separation, no doubt; the circumstances of the general character of the father; the circumstances of the general character of the mother; and, above all, it should be the duty of the Court to look to the interests of the children" (r).

When children will be given to mother.

In this case the husband had not continued to lead an immoral life, and had the character of a religious and upright

(o) 22 & 23 Vict. c. 61, s. 4.

Tr. 492; *Boynton v. Boynton*, 2 Sw. & Tr. 275.

(p) Per Lord Penzance in *Chetwynd v. Chetwynd*, L. R., 1 P. & M. 39.

(r) Per Lord Cairns, L. C., in *Symington v. Symington*, L. R., 2 H. L. Sc. 415, 420.

(q) *Marsh v. Marsh*, 1 Sw. & Tr. 312; *Suggate v. Suggate*, 1 Sw. &

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man, and it was considered that the male children would not be injured if left in their father's custody; but that the female children should be handed over to the mother, "against whom nothing had been proved."

When to relations or strangers.

In another case (*s*), after a decree absolute had been pronounced for the dissolution of a marriage, on the ground of the husband's adultery and cruelty, applications were made for the custody of the infant children of the marriage by their father and mother, and by third persons, who had been allowed to intervene for the benefit of the children. The Court, being of opinion that neither the father nor the mother were, according to the evidence given at the hearing of the cause, fit to be entrusted with the care and custody of the children, gave the custody of them to the interveners, relatives of the husband, but directed that the parents should be allowed reasonable access.

Where the wife had obtained a decree of judicial separation, and applied for the custody of the children, with the avowed purpose of bringing them up in a religion different from that of their father, and different from that in which they had been educated during the cohabitation of their parents, the Court rejected the application, and placed the children in the custody of a third person, providing, at the same time, that both parents should have access to them (*t*).

After the dissolution of the marriage, on the ground of the wife's adultery, the custody of the children will not, without strong reasons, be taken from the husband; and the Court views with disfavour the employment of detectives, for the purpose of getting up a case of immorality against a man who is leading "a notoriously respectable life" (*u*).

In a pending suit against the wife, adultery being charged and denied, the Court ordered the children, who were of tender years, to be delivered to her, on the grounds (1) that her health was suffering from being deprived of her children; and (2) that

(*s*) *Chetwynd v. Chetwynd*, L. R., 1 P. & M. 39.

(*u*) *March v. March*, L. R., 1 P. & M. 437.

(*t*) *D'Alton v. D'Alton*, 4 P. D. 87.

the children were in fact not in the custody of their father, but of a stranger (x). Chap. XIII.

The Court assumes jurisdiction over the custody of children under the Divorce Acts until they attain the age of sixteen years (y).

During the coverture the father possesses, as against the mother, an absolute right to the custody and control of the children of the marriage. This right, which is coupled with a duty, the law does not permit him to surrender by ante-nuptial agreement; and, until the legislature interfered, it was likewise considered contrary to public policy, that he should contract by a separation deed to give up the children to their mother. Except in cases of outrageous misconduct on his part,—misconduct disqualifying him from having the custody of any child—the Court never interferes with “this sacred right.” The father’s control outlasts his life; and the nature and extent of this posthumous influence will now be briefly considered.

The father’s control over the children extends beyond his life

III. *The rights and liabilities after the death of the husband.*

The father can by will, or “by a testamentary instrument in the form of a deed” (z), appoint guardians of his children to act until they respectively attain the age of twenty-one years (a), and the mother has no right to claim the custody of her children as against the persons so appointed. Thus, Lord Cottenham in a celebrated case (b) said:

Custody: the father’s power to appoint guardians.

“It is proper that mothers of children thus circumstanced should know that they have no right, as such, to interfere with testamentary guardians; and if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in respect of right in that mother, but it is in consequence of that power which the Court has of controlling the power of testamentary guardians.”

The testamentary guardian may recover possession of his ward by writ of *habeas corpus*, which the Court has no discretion

(x) *Barnes v. Barnes*, L. R., 1 P. & M. 463. See also *Cartlidge v. Cartlidge*, 2 Sw. & Tr. 567.

(y) *Mallinson v. Mallinson*, L. R., 1 P. & M. 221.

M.

(z) *Ex parte Earl of Ilchester*, 7 Ves. 348, 367.

(a) 12 Car. II. c. 24.

(b) *Talbot v. Earl of Shrewsbury*, 4 My. & Cr. 672, 683.

B B

Chap. XIII. to refuse if the guardian be a fit and proper person, and the infant too young to choose for itself (*c*).

The position, however, of the testamentary guardian is entirely different from that of the father. The right given to him is the right of tuition and custody under the Act of Parliament. It is given to him as a trust to be exercised, and the Court will interfere with his discretion in exercising that trust, in a way in which it never will interfere with the discretion of a father (*d*).

Several persons may be appointed joint guardians, and in such a case the office survives on the death of one (*e*). A father can also authorize the survivors to nominate a person to act in the place of a deceased guardian (*f*). The immediate custody of the children may be confided by the testator to persons other than the testamentary guardians; and words of recommendation, though not amounting to an imperative direction, will be regarded by the Court in settling a scheme for the education and management of the children (*g*). The marriage of a female guardian does not determine her guardianship; but, on the happening of such an event, application should be made to the Court "to ascertain what ought to be done under the altered state of circumstances" (*h*); and nothing in the recent Act seems to affect this.

The mother has no power to appoint guardians.

It may be mentioned that the mother has no power under 12 Car. II. c. 24, to appoint guardians; but if she, being a widow, purports to make such an appointment, the Court in selecting guardians will in general appoint her nominees (*i*).

The mother, when guardian.

If no testamentary guardians are appointed by the father, the mother becomes on his death guardian of her children by "nature and nurture" (*k*). This guardianship terminates at fourteen years of age as to both males and females.

(*c*) *Re Andrews*, L. R., 8 Q. B. 153. See also *Wright v. Naylor*, 5 Mad. 77.

(*d*) Per Cotton, L. J., in *Re Agar-Ellis*, 24 Ch. D. 317, 332. See also *Jones v. Powell*, 9 Beav. 345.

(*e*) *Eyre v. Countess of Shaftes-*

bury, 2 P. Wms. 103.

(*f*) *In the goods of Parnell*, L. R., 2 P. & M. 379.

(*g*) *Knott v. Cottee*, 2 Phil. 192.

(*h*) *Jones v. Powell*, 9 Beav. 345.

(*i*) *Re Kaye*, L. R., 1 Ch. 387.

(*k*) *Roach v. Garvan*, 1 Ves. sen.

Intimately connected with the subject of the custody and guardianship of children is that of their religious education; and as questions frequently arise, after the death of the father, regarding the faith in which his children are to be brought up, it is fit that the leading principles which govern these cases should be here stated.

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Religious education.

"The rule of the Court is, that the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been" (m).

Father's religion to be followed.

The father has not, indeed, the same absolute right to prescribe after his own death a form of faith for his child, as to dispose of the custody of its person. But, as Lord Cottenham remarks, "although the father has not the power of regulating, after his death, the faith in which his child should be brought up, the Court will pay great attention to the expression of his wishes, and he can exercise that power indirectly by appointing a guardian of that faith" (n).

There seem to be two classes of cases in which the rule *religio sequitur patrem* is infringed:—(1) Where the father has in his lifetime abdicated his rights; (2) where, after his death, the child has been so long brought up in another religion as to have acquired a knowledge of its distinctive tenets.

When this rule is infringed.

A father may, by his acts, altogether abdicate the right of controlling the religious education of his children, and entrust it to his wife, a person of a different religious persuasion. In that event, it seems that the Court will not treat as imperative the directions in the father's will, that the children must be brought up in his own faith (o).

i. Abdication of his rights during his lifetime.

An ante-nuptial agreement that the children shall be brought

157. See further, as to the position of the mother, *Villareal v. Mellish*, 2 Swanst. 533. Simpson on Infants, p. 113.

(m) Per Lord Justice James in *Hawksworth v. Hawksworth*, L. R., 6 Ch. 541. See also *Re Besant*, 11

Ch. D. at p. 519.

(n) *Talbot v. Earl of Shrewsbury*, 4 My. & Cr. 672, 686. See also *Hill v. Hill*, 10 W. R. 400; *Re Newbery*, L. R., 1 Ch. 263; Simpson on Infants, 120, and the cases there cited.

(o) *Hill v. Hill*, 10 W. R. 400.

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up in a different religion from that of their father is, as we have seen, not binding upon the father (*p*); but, after his death, such an agreement will be entitled to weight in the determination of the question, whether the father has abandoned his right to prescribe the religion in which his children shall be educated (*q*). The circumstance that a child has been, with its father's knowledge, baptized in a different religion from his own is one to which much importance will be attached (*r*).

ii. Acquisition
of fixed religious
principles.

The second class of cases which are an exception to the general rule, is where a child has, by the time the application has been made to the Court, received and formed fixed religious impressions and convictions which it would not be expedient to eradicate. Thus, in *Stourton v. Stourton* (*s*), the facts were as follows:—The Hon. John Stourton in May, 1846, married a lady who, like himself, was a Roman Catholic. In about a year after the marriage Mr. Stourton died intestate, and soon after his death a son was born, and was baptized as a Roman Catholic. Mrs. Stourton, however, very soon became a member of the Church of England, and trained her child in the same faith. It was not until he had attained the age of nine years that application was made to the Court; and the Lords Justices, having ascertained, from a personal interview with the infant, that he had imbibed definite religious principles, determined that he was to remain in his mother's custody, that she was to be his sole guardian, and that she was to be at liberty to continue his Protestant education.

The course pursued in *Stourton v. Stourton* of privately examining into the religious opinions of the child has been disapproved, and it may be safely asserted that it will not be adopted except as a last resort. "It appeared in that case, upon the examination of that poor child, who was nine years and-a-half old, that his intellect had been precociously excited, and he had been prematurely instructed by a proselytising mother in those matters of religious difference between the two Churches, which it was certainly most dangerous and most

(*p*) *Ante*, p. 357; and see *Re* 622; *Re Clarke*, 21 Ch. D. 817.
Meades, Ir. Rep., 5 Eq. 98. (*r*) *Hill v. Hill*, 10 W. R. 400.
(*q*) *Andrews v. Salt*, L. R., 8 Ch. (*s*) 8 De G., M. & G. 760.

improper to endeavour to introduce into the mind of a child of those tender years ; and I, for one, should be loth to do anything which could operate as the slightest encouragement to persons, whether mothers or not, who obtain access to young children, to begin the task of proselytising, when they are of too tender an age to be disturbed by those religious controversies, by which the adult world is so much distracted. I therefore decline myself to endeavour, by probing this child's mind, to ascertain whether the mother has done what there is no suggestion that she has done, namely, whether she has violated her duty to the child, by endeavouring to impress upon her the peculiar differences between the two religions" (t).

It is almost needless to point out that the Court, in its decisions on these difficult cases, divests itself as far as possible of any bias in favour of any particular religion (u). It has been said : "It is the duty of the Court to take care that a fatherless ward is brought up in the religion of the father. . . . It would be impossible for the Court to allow its ward, a Christian child, the child of a Christian father, baptized in the Christian Church, to remain under the guardianship and control of a person who professes and teaches and promulgates the religious, or anti-religious, opinions which the appellant avows that she professes and intends to persevere in teaching and promulgating. . . . In the absence of the father, the Court is the real guardian of the infant, and must perform its duty to the ward accordingly, and, if necessary, wholly irrespective of the convictions or wishes of the mother, and by separating the child from her. It is a plain, imperative duty which the law casts on the Court ; it is the plainest right of the infant ward. The same duty and the same right would exist if the child were the child of a Jew, a Parsee, a Mahomedan, or a Buddhist" (x).

(t) Per Lord Justice James, in *Austin v. Austin*, 4 De G., J. & S. 716 ; *Andrews v. Salt*, L. R., 8 Ch. 622 ; *In re Clarke*, 21 Ch. D. 817.

(u) *Lyons v. Blenkin*, Jac. 245 ; *Davis v. Davis*, 10 W. R. 245 ;

(x) Per Lord Justice James in *Re Besant*, 11 Ch. D. p. 519.

CHAPTER XIV.

PRACTICE.

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Formerly a husband must join in his wife in an action for causes of action affecting her.

THE rule of common law was, as has been seen, that a wife could not, during coverture, save in a few excepted cases, sue or be sued alone; it was necessary that her husband should be joined in the action, and if the husband wished to maintain an action on contracts made by his wife before marriage, or on contracts made by her as an administratrix, he was obliged to join her as a co-plaintiff (a); but he could sue either alone or jointly with his wife on negotiable instruments given her before marriage, on rights acquired by her after marriage, and on contracts made with himself and his wife after marriage.

(a) *Burdick v. Garrick*, L. R., 5 Ch. 233.

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For causes of action arising out of injuries to the person or property of the wife committed before or during marriage, and for injuries for which the wife had to sue in a representative character, the husband and wife were formerly obliged to sue jointly.

But a married woman could always sue alone, when her husband was civilly dead; when he had abjured the realm; when she had obtained a decree of judicial separation under 20 & 21 Vict. c. 85, s. 26, or a protection order under sect. 21 of the same statute; and, by the custom of London, when she was trading alone within the city. She could also sue alone when seeking relief in the Ecclesiastical or Divorce Courts.

Cases in which the wife could sue alone

In the old Court of Chancery, a husband who sought to recover property of his wife, had as a rule to join her as a party, and to make her a co-plaintiff; and where he sued for this purpose, or where he sued as her next friend, the action was considered as his alone (*b*).

The practice in Chancery.

Where a married woman wished to raise the question of her equity to a settlement, or if she wished to sue her husband or any other person in respect of her separate property, she had to sue by her next friend (*c*).

When a married woman could sue by her next friend.

If her husband had an interest in such property, or if he had no adverse interest, he might be made a co-plaintiff (*d*); but, generally, in a suit relating to property given to the wife for her separate use, the husband was treated as having an adverse interest, and then he was made a defendant (*e*). If the authority of the next friend was challenged, he was obliged to produce it (*f*).

The Married Women's Property Act, 1870, enabled a married woman to maintain an action in her own name for the recovery of any wages, earnings, money, and property, declared by that Act to be her separate property, or of any property belonging to her before marriage, which her husband might agree in

The Act of 1870 enabled her to sue alone in respect of property declared by that Act to be her

(*b*) *Wake v. Parker*, 2 Keen, 59.

(*c*) *Davis v. Prout*, 7 Beav. 288; *Woodward v. Woodward*, 3 De Gex, J. & S. 672.

(*d*) *Beardmore v. Gregory*, 2 H. & M. 491.

(*e*) *Roberts v. Evans*, 7 Ch. D. 830.

(*f*) *Schjott v. Schjott*, 19 Ch. D.

362. As to suits under the Partition Act, 1876, 39 & 40 Vict. c. 17, see *Wallace v. Greenwood*, 16 Ch. D. 362; *Grange v. White*, 18 Ch. D. 612.

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separate
property;

writing should belong to her as her separate property; and it gave her in her own name the same remedies against all persons for the protection and security of her property, as if such property belonged to her as an unmarried woman (*g*). This statute, however, did not enable a married woman to be sued alone in respect of the separate property created by it, even though she carried on a separate trade (*h*).

and to be sued
alone for
ante-nuptial
debts.

The Act of
1874 re-
imposed the
liability of the
husband to a
certain extent.

Section 12 of that Act made a wife liable to be sued for her debts contracted before marriage, and it was not necessary to join the husband in an action brought under that section to charge her separate property (*i*); but the amending Act of 1874 repealed those sections of the Act of 1870, and provided that a husband and wife married on or after July 30th, 1874, might be jointly sued for any debt of the wife contracted before marriage, limiting, however, the liability of the husband in any such action to the amount of certain assets received by him as specified in that Act (*k*); and in such an action against the husband and wife, it is not necessary for the plaintiff to state in his claim that the husband has received assets (*l*).

The Act of
1882 enables
a married
woman to sue
and be sued
as a *feme sole*.

The Married Women's Property Act, 1882, enacts, in sect. 1, sub-s. 2, that a married woman shall be capable—

“Of suing and being sued either in contract or in tort, or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her.”

And section 12 enacts that—

“Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*; but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort” (*m*).

(*g*) 33 & 34 Vict. c. 93, s. 11;
Moor v. Robinson, 48 L. J. Rep.,
Q. B. 156; *Ramsden v. Brearley*, L.
R., 10 Q. B. 147; *Summers v. The*
City Bank, L. R., 7 C. P. 580.

(*h*) *Hancocks v. Lablache*, 3 C. P.
D. 197; *Attwood v. Chichester*, 3 Q.
B. D. 722.

(*i*) *Williams v. Mercier*, 9 Q. B.
D. 337.

(*k*) 37 & 38 Vict. c. 50, sects. 1
and 2.

(*l*) *Matthews v. Whittle*, 13 Ch. D.
811.

(*m*) 45 & 46 Vict. c. 75, s. 12.

The 15th section of the Married Women's Property Act, 1882, provides, that a husband and wife may be jointly sued in respect of any ante-nuptial debt or liability of the wife, if the plaintiff in the action seeks to establish his claim either wholly or in part against both of them; and if in any such action, or in any action brought for such a cause of action against the husband alone, it is not found that the husband is liable in respect of any property of his wife acquired by him, or to which he has become entitled from or through his wife, he is to have judgment for the costs of his defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action brought against the husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment, to the extent to which he is liable, is to be a joint judgment against the husband personally, and against the wife as to her separate property; and as to the residue, if any, the judgment is to be a separate judgment against the wife as to her separate property only.

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How judgment is to be entered in an action brought against a husband and wife jointly.

This section re-enacts the provisions of sections 3 and 4 of the repealed Act of 1874, and any action founded on a cause of action arising under that Act can still be brought under that Act.

Where an action brought against a husband and wife jointly resulted in a judgment in favour of the husband, on the ground that he had never received any assets as specified in sect. 3 of 37 & 38 Vict. c. 50, the plaintiffs were held entitled to add the amount of the costs paid by them to him to the amount of the debt and costs for which they obtained judgment against the wife (n).

Costs in such a case.

The Rules of the Supreme Court, 1875, contained provisions enabling a married woman to sue alone by leave; but these rules have been repealed, and the Rules of the Supreme Court, 1883 (o), which are now in force contain the provision, that "married women may sue and be sued as provided by the Married Women's Property Act, 1882." A married woman, therefore, can now sue or be sued alone, both in contract and in tort; and it has been

Provisions of the Rules of the Supreme Court, 1883.

(n) *London and Provincial Bank v. Bogle*, 7 Ch. D. 773.

(o) R. S. C. 1883, Ord. XVI. r. 16.

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A married woman can only sue her husband for the protection of her separate property.

Her position as to security for costs resembles that of any other suitor.

decided in the case of *Weldon v. Winslow* (*p*), that, notwithstanding that the cause of action accrues before the passing of the Married Women's Property Act, 1882, a married woman is entitled in such a case to maintain an action of tort in her own name alone, and the right of action was not confined to torts committed after the passing of the Act. She can only sue her husband in tort (*q*) for the protection and security of her separate property; so that while the remedies given to her under sect. 12 with respect to her separate property are of the largest extent, it would seem that the general power given to her by sect. 1, sub-s. 2 to sue in tort is limited by this section as regards her husband; and that it is only in cases arising under sect. 12 that she can sue him in tort.

A married woman being now thus enabled to sue alone in her own name without obtaining leave, is in the same position with regard to giving security for costs as any other suitor (*r*), and she will only be liable to give security in the same circumstances as any other suitor (*s*). If an appellant would in the case of failure be unable through poverty to pay the costs of the appeal, he or she will be ordered to give security for costs (*t*).

The right of a married woman, whose husband is alive, to bring an action under the Act of 1882 dates from the time when that Act came into force, so that the provisions of Statutes of Limitation begin to run as regards her cause of action from January 1, 1883 (*u*).

If a husband and wife are both defendants to an action, they

(*p*) W. N. 1884, p. 184.

(*q*) 45 & 46 Vict. c. 75, s. 12.

(*r*) *Threlfall v. Wilson*, 8 P. D. 18. For instances of security being ordered, see *Brocklebank v. King's Lynn Steamship Co.*, 3 C. P. D. 365; *Massey v. Allen*, 12 Ch. D. 807; *The Julia Fisher*, 2 P. D. 115; of the order being refused, *Belmonte v. Aynard*, 4 C. P. D. 352; *Mapleson v. Massini*, 5 Q. B. D. 144; *Winterfield v. Bradnum*, 3 Q. B. D. 324; *Redondo v. Chaytors*, 4 Q. B.

D. 453.

(*s*) Instances of security for costs being applied for in the case of married women suing before the Act of 1882 will be found in *Noel v. Noel*, 13 Ch. D. 510; *Kingsman v. Kingsman*, 6 Q. B. D. 122; *Brown v. North*, 51 L. J., Q. B. 365; *Martano v. Mann*, 14 Ch. D. 419; *Re Payne*, 23 Ch. D. 288.

(*t*) *Harlock v. Ashberry*, 19 Ch. D. 84.

(*u*) *Weldon v. Neal*, 32 W. B. 828.

must both be served, unless the Court or judge orders otherwise (*x*).

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A cause or matter does not abate by reason of the marriage of any of the parties, if the cause of action continues, and in the case of the marriage of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband be made a party, or be served with notice in the manner prescribed by the Rules of Court, on such terms as may be thought just (*y*). Claims by or against a husband or wife may be joined with claims by or against either of them separately (*z*).

Where a husband is entitled or liable to execution upon a judgment or order for or against a wife, the party alleging himself entitled to execution may apply for leave to issue execution accordingly, and an order may be made, or an issue may be directed to determine the rights of the parties, which may be tried in any of the ways in which an action may be tried (*a*).

No special case in any cause or matter to which a married woman, not being a party thereto in respect of her separate property, or of any separate right of action by or against her, shall be set down for argument without leave, the application for which must be supported by sufficient evidence, that the statements contained in such special case, so far as the same affect the interest of the married woman, are true (*b*).

It was held, prior to the passing of the Act of 1882, that an order to sign final judgment under Ord. XIV. r. 1 could not be made against a married woman, and that the Court could only order an inquiry as to the existence of separate estate chargeable with the sum claimed (*c*); but it would seem that this is not so now, and since the Act of 1882, an order for final

Order for final judgment by default or under Order XIV. may now be made against a married woman.

(*x*) R. S. C. 1883, Ord. IX. r. 3.

(*y*) R. S. C. 1883, Ord. XVII. rr. 1 and 2.

(*z*) R. S. C. 1883, Ord. XVIII. r. 4.

(*a*) R. S. C. 1883, Ord. XLII. r. 23.

(*b*) R. S. C. 1883, Ord. XXXIV. r. 4.

(*c*) *Durrant v. Ricketts*, 8 Q. B. D. 177.

Chap. XIV. judgment has been made in Ireland on a specially indorsed writ, in an action brought against a married woman alone for the price of goods supplied to her, the order made giving leave to the plaintiff to sign final judgment for the amount indorsed on the writ, and for the costs of the suit and the motion (*d*). It has also been decided that the words in sect. 1, sub-sect. 2, of the Act of 1882, "in respect of and to the extent of her separate property," do not limit the effect of the rest of the sub-section, so that a married woman can both sue and be sued to judgment, and judgment by default, or under Ord. XIV., can be signed against her, or a receiver may be appointed, in respect of her separate property which is not subject to restraint on anticipation, for that is the property against which execution can issue and be enforced (*e*). So, also, where a surety, who was sued upon a guarantee which he had given for the debt of a married woman, served a third-party notice on her, and she appeared, an order for judgment was made upon her under Ord. XVI. r. 52 (*f*). As a married woman can now sue in her own name, she is also entitled to be a petitioning creditor in bankruptcy, for, as a general rule, a person, who is entitled to take proceedings to recover a debt, can present a creditor's petition.

A married woman can be a petitioning creditor.

A married woman can certainly be made a bankrupt if she is carrying on a trade separately from her husband, and the question whether she can be made a bankrupt in other cases is discussed in the next chapter (*g*).

A married woman could always be arrested under a *ca. sa.*, but if she had no separate property she was entitled to her discharge (*h*). The Debtors Act of 1869 (*i*), applied to married women, so that an order for commitment was made in a case in which a married woman did not plead her coverture (*k*), and since the Act of 1882, there can be little doubt that an order

(*d*) *Brown v. Morgan*, 12 Ir. C. L. Rep. 122.

(*e*) *Bursill v. Tanner*, 50 L. T. (N. S.) 589; *Perks v. Mylrea*, W. N. 1884, p. 64.

(*f*) *Gloucestershire Banking Co. v. Phillips*, 12 Q. B. D. 533.

(*g*) See *post*, p. 400.

(*h*) *Ivens v. Butler*, 7 E. & B. 159; 26 L. J., Q. B. 145; *Jay v. Amphlett*, 32 L. J., Ex. 176; *Larkin v. Marshall*, 4 Ex. 804.

(*i*) 32 & 33 Vict. c. 62.

(*k*) *Dillon v. Cunningham*, L. R., 8 Ex. 23.

for commitment can be made under the Debtors Act against a married woman, if the Court is satisfied that she has means and can pay (*l*). Where the separate property of the wife was concerned, the Court of Chancery could enforce its orders and decrees against a married woman (*m*).

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By sect. 12 of the Act of 1882 (*n*), every woman, whether married before or after the Act, has against all persons whomsoever (but subject, as regards her husband, to a restriction) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if she were a *feme sole*, and in any indictment or other proceeding it will be sufficient to allege the property concerning which the proceeding is taken to be her property, and in any proceeding under this section a husband or wife "shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding." Sect. 16 enacts that "a wife doing any act with respect to any property of her husband which, if done by the husband with respect to the property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband" (*o*). It having been decided that these two sections did not enable a husband to give evidence against his wife in criminal proceedings instituted by him against her under sect. 16 (*p*), an amending Act was passed in the session of 1884, which has the effect of placing husbands and wives on the same footing in this respect (*q*).

May take criminal proceedings.

The Married Women's Property Act of 1870 (*r*) contained, and the Act of 1882 (*s*) contains, provisions for determining, in a summary way, questions which may arise between the husband and wife as to the title to or possession of property.

Disputes as to the title to or possession of property arising between husband and wife may be determined in a summary manner.

The Act of 1870 limited this mode of proceeding to property declared by that Act to be the separate property of the wife, but the provisions of sect. 17 of the Act of 1882 are more

(*l*) *Chard v. Jervis*, 9 Q. B. D. 178.
(*m*) *Hope v. Carnegie*, L. R., 7 Eq. 254.

(*n*) 45 & 46 Vict. c. 75, s. 12.

(*o*) Sect. 16.

(*p*) *R. v. Brittleton*, 12 Q. B. D. 266.

(*q*) See the Act, 47 & 48 Vict. c. 14, in the Appendix.

(*r*) 33 & 34 Vict. c. 93, s. 9.

(*s*) 45 & 46 Vict. c. 75, s. 17.

Chap. XIV. extensive, so that they will practically supersede the provisions of the earlier statute, for this section of the Act of 1882 applies to all persons whenever married.

Sect. 22 of the Act of 1882 provides that a husband or wife, married before the Act came into force, can sue and be sued under the provisions of the repealed Act of 1870, for or in respect of any debt, contract, wrong or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of the Act, so that in the case of a marriage celebrated before the 9th of August, 1870, either party can apply under sect. 9 of the Act of 1870 with respect to any property declared by that Act to be the separate property of the wife, if the right or liability accrued before the Act of 1882 came into force.

Act of 1882,
s. 17.

Sect. 17 of the Act of 1882 enacts that, "in any question between husband and wife as to the title to or possession of property," either party, or any bank, corporation, company, public body, or society in whose books any stocks, funds, or shares of either party are standing, may apply, by summons or otherwise, in a summary way, to any judge of the High Court, or at option, and irrespective of the value of the property in dispute in England, to the judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the division in which either party resides; and the judge or chairman to whom the application is made may make such order with respect to the property in dispute, and direct any such inquiry touching the matters in question, as he shall think fit.

Any such order is to be subject to appeal; and if the application is made in a County or Civil Bill Court in a matter in which, owing to the value of the property in dispute, the Court would not, but for the provisions of the Acts of 1870 and 1882, have had jurisdiction, the defendant can as of right remove the proceedings into the High Court.

Any application under this section may, at the request of either party, be heard in private.

Any bank, corporation, company, public body, or society in whose books any stocks, funds, or shares of either party are

standing, is, in the matter of any such application, to be, Chap. XIV.
for the purposes of costs or otherwise, treated as a stakeholder only.

By section 23, the legal personal representative of a married woman has, in respect of her separate estate, the same rights and liabilities and is subject to the same jurisdiction as she would be if she were living, so that the legal personal representative will, in respect of matters arising under sect. 17, be able to apply in the manner provided by that section. The jurisdiction of County Courts is limited by various statutes, but the limit differs according to the subject-matter. In most personal actions the limit is fixed at 50*l.*; in actions affecting the title to real property the annual value of the property must not exceed 20*l.*; in actions relating to mortgages, the amount of the debt, and in actions for the administration of estates the value of the property, must not exceed 500*l.*, and that amount is the limit of the jurisdiction of the County Court in actions for specific performance, for the delivering up or cancelling any agreement for sale, in actions relating to partnership, and in actions under the Partition Act, 1868.

Rights of the legal personal representative under this section.

Limits of County Court jurisdiction apart from the Act.

The position of the stakeholder in applications made under this section will somewhat resemble that of a sheriff or other person entitled to take out an interpleader summons; and when he claims no interest in the property, and is not colluding with either party, and if there has been nothing in his conduct to disentitle him to his costs, he will obtain an order for security for the costs of any further proceedings which may be ordered (*s*), or he will, if the matter goes no further, obtain them out of the fund (*t*); but a stakeholder must act so as to conduce to the settlement of the question between the parties, or he will not be allowed his costs (*u*).

Position of stakeholder.

Mere stakeholders are not entitled to pay money the subject of conflicting claims into Court under the Trustee Relief Acts (*x*), unless there is a trust; but when money has been so paid in, and

(*s*) *Tanner v. The European Bank*, L. R., 1 Ex. 261.

(*u*) *Laing v. Zeden*, L. R., 9 Ch. 736.

(*t*) *Cotter v. Bank of England*, 3 Moore & Sc. 180; *Duear v. Mackintosh*, *ib.* 174.

(*x*) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.

Chap. XIV. one of the claimants seeks under the Act to get it paid out, the stakeholders have been allowed their costs (*y*).

It would seem that the bank or other public body mentioned in the section will be able to apply in a summary manner under it; and that the fact of its having accepted property from a husband or a wife will not prevent it from so applying, when a dispute arises between the husband and the wife as to the title to or the possession of the property: for, unlike an ordinary bailee, such a body can allege that the husband or wife, as the case may be, has set up a claim to the property, and it will not be necessary for it to prove a title paramount existing in the claimant (*z*).

(*y*) *Re Haycock's Policy*, 1 Ch. D. 611; *Re Sutton's Trusts*, 12 Ch. D. 175. (*z*) *Biddle v. Bond*, 6 B. & S. 225; *Ex parte Davies*, 19 Ch. D. 86.

CHAPTER XV.

RECENT LEGISLATION.

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THE changes effected by recent legislation in the several branches of law discussed in the preceding pages have, in most cases, been already referred to under their several heads. It seems, however, useful to bring together, in a single chapter, the most important of these alterations and innovations, and to notice specially some of the difficulties which arise in connection with the Act of 1882 (a).

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The first and perhaps the most important alteration effected by the recent Act, is that which has been introduced in the capacity or personal *status* of a married woman. By the common law, the personality of a woman was on marriage almost entirely merged in that of her husband, and the disability of coverture was absolute and complete (b). Personal *status* is the correlative of disability, and the removal of the latter necessarily creates or restores to a corresponding extent the privileges of an independent person, in other words, of a citizen. It must, however, be remembered that there is a disability of

Capacity of a married woman.

(a) 45 & 46 Vict. c. 75. The text of this Act, and also of the Acts of 1870 and 1874, will be found in the Appendix.

(b) See, as to power of married women to contract with respect to separate property prior to the Act of 1882, *ante*, pp. 335 *et seq.*

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Under the
Act of 1870.

sex as well as a disability of coverture; and that the gradual removal of the disabilities of married women tends to place them on a level, not with their husbands, but with their unmarried sisters. Prior to the Act of 1882, the legislative inroads on the disabilities of coverture were of a comparatively trivial character (c). The Bill of 1870 contained clauses analogous to the provisions of sect. 1 of the Act of 1882, but these were not included in the Act as it became law, and the only respect in which a married woman's *status* can be said to have been altered by the Act of 1870 (d), is with reference to certain kinds of property which are by that Act constituted "separate property." This might comprise the wages, earnings, money and property by the Act declared to be separate property, as well as any property which belonged to the married woman before marriage, and which her husband by writing had agreed with her should belong to her after marriage as her separate property. If the property were vested in trustees, the married woman had her remedy in equity, and there was no need of additional protection; but with reference to the foregoing descriptions of property, there would be no trustees, and accordingly the Act of 1870 conferred upon her an independent *status* at law, with respect to remedies for the recovery and protection of the separate property (e). By the 11th section it is enacted as follows:—

"A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels, or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, and property belonged to her as an unmarried woman; and in any indictment or other proceedings it shall be sufficient to allege such wages, earnings, money or property to be her property."

(c) The *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), and that known as *Malins' Act* (20 & 21 Vict. c. 57), provided methods of dealing with property rather than removed

disabilities of married women.

(d) 33 & 34 Vict. c. 93.

(e) See *Howard v. Bank of England*, L. R., 19 Eq. 295.

Of this Act it was said by Sir G. Jessel, M. R. :—

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"It does appear to me that the present Act gives no power to contract to a married woman, which she did not possess before. It does make certain property, property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a Court of equity, and it superadds to that certain remedies in a Court of law, which it is considered desirable to give to the married woman in respect of these small sums, but beyond that I think the Act makes no alteration in the position of a married woman" (*f*).

It would, therefore, appear that the Act of 1870 did not go far towards conferring on a married woman a *status* and capacity independent of her husband.

The Act of 1882 has, however, gone a great deal farther towards removing the disabilities of coverture: for it enacts (and this provision applies to women whenever married) that :—

Under the Act of 1882.

"A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

This, without defining what is or is not separate property, confers upon a married woman complete personal capacity in relation to property.

The *status* and capacity given by the first section would have seemed sufficient, without further provisions, to enable a married woman to hold property in her own name, and to deal with it without the intervention of her husband, and without it being deemed necessary that he should join with her in any dealings with it: but to prevent misconception, the Act contains in subsequent sections (*g*) express declarations as to the rights and powers of married women to hold and deal with property which have been already referred to in detail (*h*).

An important result of this section is to abolish the old common law doctrine that, by the marriage, the personality or separate existence of the wife was in law completely merged in the husband. According to the common law a person could

Doctrine of merger of the wife in the husband abolished.

(*f*) *Howard v. Bank of England*,
L. R., 19 Eq. at p. 301.

(*g*) 45 & 46 Vict. c. 75, ss. 6—10.

(*h*) See *ante*, p. 294.

Chap. XV. not convey or transfer either real or personal property to himself, whether alone or jointly with another; and it followed from this that, in the words of Littleton (*k*), "A man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law." Lord Coke (*k*) adds to this, "A man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her for the reason that Littleton here yieldeth." Again, Bracton (*l*) states, "*Vir et uxor sunt quasi unica persona, quia caro una, et sanguis unus.*"

Conveyance
or transfer of
property by a
husband to
his wife.

The only method by which a conveyance or transfer of any kind of property by a husband to his wife could, previously to recent legislation, have been carried into effect, was by the interposition of a trustee, the property being conveyed or transferred by the husband to a third person in trust for the wife; but even then, unless a trust for the separate use were established in favour of the wife (though, in such circumstances, very slight evidence of intention would probably have sufficed) (*m*), the beneficial interest which the wife took in the property would have reverted to her husband.

Although a separate existence was given by the Courts of Equity to a married woman, this did not enable a husband to convey or transfer property to his wife even for her separate use. In two cases (*n*), indeed, the Courts supported a conveyance by a husband to his wife on the ground that it constituted a valid declaration of trust by the husband; but in the most recent case (*o*), V.-C. Hall, while characterising the state of the law as "monstrous," refused to follow the cases which have been cited.

In the case of a conveyance of freeholds by the husband to his wife for her separate use, it would seem that the beneficial interest passed to the wife, but that the legal estate remained in the husband.

(*k*) Co. Litt. 112 a.

(*l*) Lib. 5, Tract. 5, cap. 25.

(*m*) It was suggested in *Ex parte Beilby*, 1 Glyn & Jam. 167, that where a husband was sole trustee for his wife, a trust for her separate

use must be inferred.

(*n*) *Baddeley v. Baddeley*, 9 Ch. D. 113; *Fox v. Hawks*, 13 Ch. D. 822.

(*o*) *Re Breton's Estate*, 17 Ch. D. 416.

To remedy this state of things the 50th section of the Conveyancing and Law of Property Act, 1881 (*p*), enacted that freehold land, or a thing in action, might be conveyed by a husband to his wife, and by a wife to her husband (*q*), alone or jointly with another person.

What may be the construction and effect of this provision is now unimportant, as it seems to be entirely superseded by the fundamental changes in the legal position of the husband and wife, which have been introduced by the Married Women's Property Act, 1882.

It also followed from the principle that the husband and wife were but one person in law, that gifts or transfers of personal property by a third person to a married woman, unless specially given or transferred to her for her separate use, vested at once in her husband (*r*).

A practical question of considerable importance is raised by the language of the first section of the Act of 1882, namely, whether the will of a married woman made during coverture will henceforward be valid as regards property acquired after the death of her husband. Before the Act, it was settled law that a married woman's will, made with the assent of her husband, (which assent he could retract at any time before

Wills of
married
women.

(*p*) 44 & 45 Vict. c. 41.

(*q*) The question of the conveyance or transfer of property by the wife to the husband has not been discussed, for the reason that formerly if the wife had any property it must have been separate property, as to which she was treated in Equity as a *feme sole*, and could convey or transfer the beneficial interest to her husband, while the legal estate would either be already in him or vested in trustees.

(*r*) Conf. *Mander v. Harris*, 24 Ch. D. 222. There is some doubt whether, prior to the Act of 1882, the consent of the husband to a gift or transfer of property by a third party, whether a relative or a stranger, to his wife for her separate use, was not necessary to enable her to accept

and enjoy it as her separate property; and whether, in the absence of such consent, the chattel given or property transferred did not vest in the husband. It seems somewhat difficult to maintain the principle, that a husband could against his will be made a trustee for his wife of articles or property given or transferred to her by a stranger contrary to his wishes. Since the Act of 1882, no such difficulty as this can arise, as the wife can herself acquire and hold property as a *feme sole*; but it is not impossible that the question may still be raised whether a wife is entitled, against her husband's express wishes, to accept gifts, or transfers of property, from strangers.

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probate) did not, if she survived her husband, dispose of personalty other than that to which she had been entitled for her separate use; and that there was a break of continuity in her *status* on becoming a widow, which prevented the 24th section of the Wills Act from operating retro-actively, so as to give her disposing power over after-acquired property (s).

A married woman, whenever married, is now (t) rendered capable of disposing by will of any real or personal property as her separate property, in the same manner as if she were a *feme sole*; and such a will would, as regards any property acquired during the coverture, be undoubtedly valid, whether she survived her husband or not. But it is open to argument, whether a will made during coverture would be now more effectual than before the Act, to pass property acquired during widowhood. The question seems to turn, not so much upon the language of the section as upon the further question, which has been already discussed, whether a married woman has acquired a *separate status* under the Act. If she has, there will be no break in continuity between coverture and widowhood, and the will, whenever made, will speak from the death of the testatrix. This seems to be the sounder view, and derives some confirmation from the fact that, except in the case of marriages before the Act, the husband's assent can no longer be required under any conceivable circumstances. It is submitted, that the effect of the Act is to overthrow the decision in *Willock v. Noble*, and that a married woman, whatever may be the date of the marriage, may now make a will disposing of her residuary estate as effectually as if she were a man; subject, however, to this limitation in the case of women married before 1883, that the power of disposition would not extend to property, the title to which had accrued before the commencement of the Act.

Devolution of
married
women's pro-
perty on
intestacy.

Another question of importance arising upon the first section is, whether in the case of the intestacy of a married woman, the devolution of her property is thereby altered.

As before stated, the section confers upon a married woman complete personal capacity in relation to property; but it cannot have been intended by the force of the words "as if she

(s) *Willock v. Noble*, L. R., 7 H. L. 580; *Ibid.* 8 Ch. 778.

(t) Married Women's Property Act, 1882, s. 1 (1).

were a *feme sole*," to alter the devolution of a married woman's separate property upon her death intestate, and to deprive the husband of the rights which he formerly possessed in respect of that property. For the object of the clause is to abolish the disabilities from which a married woman suffered of acquiring, holding, and disposing of property during the coverture, and not to affect the devolution of property after its termination.

It will be observed that the operation of the clause is confined to "acquiring, holding, and disposing," words which imply a personal dealing by the married woman with the property, and in no way affect the nature of the property itself.

If a married woman dies intestate, seised of an estate of inheritance and possessed of personalty—both being separate property within the meaning of this section—there is no reason why the husband should not take an estate by the curtesy in the one, and an absolute interest in the other, if the circumstances are such as would have qualified him to do so under the old law. For, if it had been intended to abolish these rights of the husband, the Act would surely have declared that the property should not only be held, but also devolve as if the wife had been a *feme sole*. An argument has, however, been suggested, which rests on the supposed analogy of a married woman's present position to that under a protection order. Such an order, indeed, deprives the husband both of his beneficial interest in, and of his right of administration of, his wife's property (*u*); but the reason of that is, not because the property was "to belong to the wife as if she were a *feme sole*," but because it is expressly declared by the 21st section of the Divorce and Matrimonial Causes Act, 1857 (*x*), that the wife shall during the continuance of the order be and be deemed to have been in the same position as if she had obtained a decree of judicial separation. By the 25th and 26th sections of the same Act, that position is accurately defined: she is thereby constituted during the continuance of the separation a *feme sole* with respect to property, and also for the purposes of contract, and wrongs and injuries.

Interests of the husband in his wife's property after her death.

(*u*) *In the Goods of Weir*, 2 Sw. & Tr. 451; *In the Goods of Stephenson*, L. R., 1 P. & D. 287; *Allen v.*

Humphrys, 8 P. D. 16.

(*x*) 20 & 21 Vict. c. 85.

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And, indeed, so far from relying on the provision that the separated wife is to be considered as a *feme sole*, the section proceeds to enact, that on her decease her property "shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead."

The cases, therefore, under protection orders, instead of supplying an argument in favour of excluding the husband, point distinctly in the opposite direction. It may, indeed, be observed that such an argument founded on the words "as a *feme sole*," would, if valid, exclude not only the husband, but the children of the marriage; and it can scarcely be seriously contended that for the future, in ascertaining the next-of-kin or the heir-at-law of a married woman, her lineal issue are to be treated as illegitimate, and excluded from all share in the real and personal estate of their mother.

Moreover, the 25th section of the Statute of Frauds, which enacted that—

Neither the said act (the Statute of Distributions), nor anything therein contained, shall be construed to extend to the estates of *feme covert*s that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act,

has not been repealed by the Married Women's Property Act, 1882.

Civil status of
a married
woman.

The Act having provided for the personal capacity of a married woman in dealings with property, proceeds by the next sub-section (sub-sect. 2) to confer upon her a civil status in respect of contracts and legal proceedings. This seems, at first sight, only to affirm the equitable doctrine, that in respect of her separate estate, a married woman is to be regarded as a *feme sole*; but when it is read with sub-sections (3) and (4), her powers and liabilities will be found to be considerably enlarged. These three sub-sections are as follows:—

"(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her ;

and any damages or costs recovered by her in such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

“(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

“(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.”

It would seem that the qualification which limits the operation of the contract, and the payment of damages and costs, to the separate property of the married woman, amounts to nothing more than the practical limitation imposed by the circumstances of men upon the claims of their creditors. The words “not otherwise” at the end of sub-section (2) cannot relate to the married woman’s property, all of which is included in the term “separate property.” It is probable that they were inserted to negative the idea that the husband might be liable; although it is difficult to conceive how he could be affected by an action to which he was not a party.

It is important to observe that this second sub-section confers upon a married woman the privilege and capacity of entering into, and *rendering herself liable* in respect of and to the extent of her separate property on, any contract in all respects as if she were a *feme sole*. It also confers upon her the privilege and capacity of suing and being sued in all cases as if she were a *feme sole*, without, as was formerly necessary, her husband being joined as either plaintiff or defendant; and it enacts that damages or costs recovered *by her* shall be her separate property, and that those recovered *against her* shall be payable out of her separate property, and not otherwise.

Power of
a married
woman to
contract.

Power of
a married
woman to sue
and be sued
as a *feme sole*.

This power of suing and being sued is not limited by any qualification. A married woman may sue and be sued in all respects as if she were a *feme sole*. In *Perks v. Mylrea* (o), Field, J., said:—

“A *feme sole* can sue to judgment. She may obtain judgment and

(o) In Chambers, W. N. 1884, p. 64.

Chap. XV. may have judgment signed against her. Again, damages or costs may be *recovered* against a married woman. Recovery is the technical word for a common law judgment. I think, therefore, that judgment in default or under Order XIV. may be signed against a married woman; but I think that execution should only issue against her separate estate."

It has been decided (*p*), under this section, that a married woman is entitled to sue in her own name in respect of torts which were committed before the commencement of the Act. Another result of the section is that a married woman must now bring her action, in respect of torts, within the statutory period from the 1st January, 1883. The Statute of Limitations (*q*) provides that if any person entitled to bring certain actions shall be, at the time of the cause of action accruing, a *feme covert*, such person shall be at liberty to bring such action within the time limited after being *discovert*; and the commencement of the Act has been determined to be the commencement of *discoverture*, for the purpose of calculating the period of limitation (*r*).

Power to sue
her husband.

It is not clear whether, by virtue of this second sub-section alone, a married woman can sue her husband in contract. She is, indeed, empowered to sue in all respects as a *feme sole*, but the express declaration that her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or legal proceeding brought by or taken against her, seems to suggest that this sub-section was intended to apply only to those cases in which a married woman took proceedings against persons other than her husband, and to which proceedings her husband would formerly have been a necessary party; and that it was not intended to give to her the right to sue her husband in cases coming within this sub-section alone.

But there is no doubt that, in all cases where proceedings are necessary for the protection and security of her separate property, a married woman can sue her husband; for sect. 12 of the Act of 1882 (*s*) enacts that—

"Every woman, whether married before or after this Act, shall have

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| (<i>p</i>) <i>Severance v. Civil Service Supply Association</i> , 48 L. T. 485; | (<i>q</i>) 21 Jac. 1, c. 16, s. 7. |
| <i>James v. Barraud</i> , 31 W. R. 786; | (<i>r</i>) <i>Weldon v. Neal</i> , 32 W. R. 828. |
| <i>Weldon v. Winslow</i> , 28 S. J. 736. | (<i>s</i>) 45 & 46 Vict. c. 75, s. 12. |

in her own name against all persons whomsoever the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress, by way of criminal proceedings, for the protection and security of her own separate property as if such property belonged to her as a *feme sole*; but except as aforesaid no husband or wife shall be entitled to sue the other for a tort."

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The effect of these two sections may be summed up thus: (1) that a married woman, whenever married, may take civil proceedings in her own name, as if she were a *feme sole*, against all persons, including her husband, where the proceedings are for the protection and security of her separate property; (2) that a married woman, whenever married, may take proceedings either in contract or in tort or otherwise in her own name, as if she were a *feme sole*, against all persons other than her husband; and (3) it may be that a married woman, whenever married, may sue her husband in contract, even where the proceedings are not for the protection and security of her separate property, if such a case can exist.

Civil proceedings by a married woman.

With regard to criminal proceedings, a married woman, whenever married, may take such proceedings in her own name for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, against all persons, including her husband; but this right against her husband is subject to two restrictions: first, while they are living together she cannot take criminal proceedings against him in respect of her property; and, secondly, while they are living apart she cannot take such proceedings as to any act done by the husband while they were living together, unless the property has been wrongfully taken by him when leaving or deserting, or about to leave or desert her (*t*).

Criminal proceedings by a married woman.

The privileges given to a married woman, of taking civil proceedings in her own name, and on her own behalf, are accompanied by the corresponding liability of being sued in all respects as if she were a *feme sole* (*u*); but it seems, from the wording of the sub-section, that this liability is confined to proceedings by persons other than her husband, and that he cannot take civil proceedings in contract or in tort or otherwise against

Proceedings against a married woman.

(*t*) 45 & 46 Vict. c. 75, s. 12.

(*u*) *Ibid.* s. 2, sub-s. 2.

Chap. XV. her. He has, however, a right to take criminal proceedings against her similar to that which she has against him (x).

It was decided in *Reg. v. Brittleton* (y) that, although the provisions of sect. 12 enabled a wife, when taking criminal proceedings against her husband, to give evidence against him, yet that a husband who took criminal proceedings against his wife under sect. 16 could not give evidence against her, and, to remedy this defect, an amending statute was passed in the session of 1884 (z), which, after referring to sects. 12 and 16 of the Act of 1882, enacts that—

“In any such criminal proceedings against a husband or wife, as is authorized by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence.”

Liability of a married woman on her contracts.

The 3rd sub-section of sect. 1 abolishes the old rule in equity that, in order to bind the separate property, the contract must have been made with reference to and upon the credit of that property, or from its nature must have been intended to be so referred (a), and substitutes the principle, that every contract by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

Liability on contracts for necessities or as agent of her husband.

It is, however, doubtful whether it was intended to alter the law in the case of contracts made by a married woman for household purposes, or for necessities, when living with her husband, or as agent for her husband. It is true that a married woman, acting as agent, can now be sued as a *feme sole*, whereas formerly an action would not lie against her; but, nevertheless, it would seem that the liability of the husband upon contracts made by his wife as his agent, or in respect of which he would at common law have been liable, has not been taken away by the Act, and that upon such contracts the wife is not rendered liable by the Act.

Burden of proof.

The burden of proof has, however, been shifted from the creditor, who formerly had to show that the separate property

(x) 45 & 46 Vict. c. 75, s. 16.

(z) 47 & 48 Vict. c. 14.

(y) 12 Q. B. D. 266. See *ante*,

(a) See *ante*, p. 309.

p. 89.

was liable, to the married woman, upon whom it will lie, in all cases, to show that the contracts were of such a nature. Chap. XV.

The words, "unless the contrary be shown," probably mean shown at the trial of the action brought upon such a contract, but it is a question whether a married woman, in order to displace her liability, must not show that, at the time at which she entered into the contract, she did so without the intention of binding her separate property, and that this fact was known to the person with whom the contract was entered into.

The 4th sub-section of sect. 2 is a legislative reversal of the decision of the Court of Appeal in *Pike v. Fitzgibbon* (b), and in reversing that decision it seems to have overthrown the doctrine upon which that decision was founded. Lord Justice James, in the course of his judgment, made use of the following language:

Status of a married woman.

"It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but, having a separate estate, has acquired a sort of equitable *status* of capacity to contract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. It is contended that because equity enables her, having estate settled to her separate use, to charge that estate, and to contract debts payable out of it, therefore she is released altogether in the contemplation of equity from the disability of coverture, and is enabled in a Court of Equity to contract debts to be paid and satisfied out of any estate settled to her separate use which she may afterwards acquire, or, to carry the argument to its logical consequences, out of any property which may afterwards come to her. In my opinion there is no authority for that contention" (c).

And Lord Justice Brett, in the same case, said :

"It is not true that equity has recognised or invented a *status* of a married woman to make contracts; neither does it seem to me that equity has ever said that what is now called a contract is a binding contract upon a married woman. What equity seems to have done is this: it has recognised a settlement as putting a married woman into the position of having what is called a separate estate, and has attached certain liabilities not to her but to that estate" (d).

Now, as this 4th sub-section enables a married woman in unequivocal terms to contract with respect to and to bind not only the separate property which she is possessed of or entitled to at

After-acquired property liable for debts.

(b) 17 Ch. D. 454.

(c) *Ibid.* 460.

(d) *Ibid.* 461.

Chap. XV. the date of the contract, but also "all separate property which she may thereafter acquire," it seems that, according to Lord Justice James, this latter provision constitutes that sort of *status* which equity failed to confer (e).

Effect of execution of general power by married woman. In addition to all the existing property and after-acquired property of a married woman being thus rendered liable, a further step has been taken to remove the disabilities of married women to meet their engagements.

It was settled law, that where a man had a general power of appointment by will, the exercise of the power rendered the property assets for the payment of his debts. But in the case of the execution of a similar power by a married woman, it was doubtful whether the same result ensued. This doubt has been removed by the 4th section of the Act, which enacts as follows :—

"The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

This section seems only to enact in express words what would have been held to follow from the *status* and capacity conferred upon married women by the general provisions of the Act. It settles the doubt which previously existed as to whether, where a general power of appointment by will only was given to a married woman, and she exercised it, the property appointed was thereby rendered liable for her debts; so that now, whether the general power is by deed or will, or by will only, the exercise of it by the married woman will render the property appointed liable for her debts in the same manner as her separate estate is liable (f).

There is no alteration in the law in those cases where there is a gift over in default of appointment, and the power is not exercised. In such a case the parties entitled in default are entitled to the property notwithstanding the claims of creditors of the married woman.

(e) See *Pike v. Fitzgibbon*, 17 Ch. D. at p. 460.

(f) The old law on these points is fully stated *ante*, p. 309.

The abolition of imprisonment for debt (*g*), except in a few cases which come within a quasi-criminal jurisdiction of the Courts, has reduced all judgments to the position of judgments "to the extent of" the debtor's property; the question, therefore, whether a married woman can render herself personally liable is of diminished importance; still it possesses more than a mere theoretical interest, for, upon the answer to be given to it, depends the form of the judgment which can be entered up against her, and the liability of a non-trader to the law of bankruptcy.

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Personal liability of a married woman.

Upon this question of the personal liability of a married woman, the following passage from the judgment of Sir G. Jessel, M. R., in *Besant v. Wood* is important:—

"It has been said over and over again that a married woman cannot contract. That again is too wide a proposition. She undoubtedly can contract, we all know, with respect to property settled to her separate use. But it is a contract which at first in a sense was not personally binding on a woman; but it now binds her about as much as it binds a man. It no longer personally binds a man in the sense that you can send him to prison for a breach of it" (*h*).

Also in the previously cited case of *Perks v. Mylrea* (*i*), Field, J., said:—

"Damages or costs may be recovered against a married woman. . . . I think, therefore, that judgment . . . may be signed against a married woman; but I think that execution should only issue against her separate estate."

The expression "legal personal representative of any married woman," which occurs in sect. 23 of the Act, is not without importance in considering the subject of *status*. For if there can be a personal representative with all the rights and liabilities of the deceased, the latter must certainly have possessed a separate personality capable of being so continued.

(*g*) See the Debtors Act, 1869 (32 & 33 Vict. c. 62).

(*h*) 12 Ch. D. 605, 621.

(*i*) In *Chambers*, W. N. 1884, p. 64.

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As to the form of the judgment, it was well established under the former practice, that no personal judgment could be entered up against a married woman (*k*), for a plea of coverture was a good defence at law, and the equitable remedy was only against her separate estate.

Rights of
creditors.

The rights of a creditor were (1) to obtain a declaration that his debt was chargeable upon the separate estate, with an inquiry of what that estate consisted at the date when the debt was incurred, and how much thereof was still in existence and capable of being reached by the judgment of the Court (*l*); (2) a receiver by way of equitable execution (*m*).

The trustees of a fund held upon trust for the separate use of a married woman were held not to be necessary parties to the action against her (*n*).

Form of judgment.

The reason why a judgment against a married woman was only enforceable by equitable execution seems to be, that no judgment against her could have been executed by the sheriff—her separate estate being necessarily vested in trustees. But now, since she can hold separate property as if she were a *feme sole*, and since her engagements whenever made bind her separate property whenever acquired unless the contrary be shown, it is conceived that a judgment *may* issue against a married woman as if she were a *feme sole*, leaving to the sheriff to ascertain, as he is bound to do in all cases, what is the property of the debtor (*o*). The separate property of a married woman may, of course, be vested in trustees, and in that event equitable execution must be obtained, as it must also be obtained when a male debtor is similarly circumstanced, in order to appropriate the

(*k*) *Atwood v. Chichester*, 3 Q. B. D. 722; *Durrant v. Ricketts*, 8 Q. B. D. 177; *Davies v. Ballenden*, 46 L. T. 797.

(*l*) *Collett v. Dickenson*, 11 Ch. D. 687; *Pike v. Fitzgibbon*, 17 Ch. D. 454.

(*m*) *Bryant v. Bull*, 10 Ch. D. 153; *Re Peace and Waller*, 31 W. R. 899.

(*n*) *Davies v. Jenkins*, 6 Ch. D.

728; *Bryant v. Bull*, *supra*; *Flower v. Buller*, 15 Ch. D. 665; *Collett v. Dickenson*, *supra*; *Re Peace and Waller*, *supra*.

(*o*) If the property is subject to a restraint on anticipation, it will, in general, be vested in trustees, and, even if not so vested, the married woman will be able to obtain an injunction restraining the execution.

interest of the *cestui que trust* to the payment of the debt (*p*). If, however, a sum of money is actually due by the trustee, the equitable debt may be attached by a garnishee order (*q*). Chap. XV.

The question whether a married woman, not being a trader, is liable to the bankrupt law, is closely connected with the subject of the foregoing discussion; for "every reason that induces the Courts of law to make a *feme covert* personally liable for her contracts, equally operates to make her subject to bankruptcy; and it would be the height of cruelty to determine that a woman should be taken in execution for her debts, and at the same time preclude her from that benefit which the Legislature affords 'to honest and industrious traders, sinking under the pressure of undeserved misfortune'" (*r*). Under the old law, a married woman, whether she had separate estate or not, was not liable to the bankrupt law (*s*), unless she were a trader within the custom of London (*t*), or her husband was a convict, or had abjured the realm, or been exiled (*u*). The reason why she was in general outside the bankrupt law, as clearly appears from the judgments of the Lords Justices in *Ex parte Jones*, was that she was not *personally* liable to be sued for a debt. But now, whether it be called a personal liability or not, a married woman is subject to all the inconveniences of personal liability; and, unless she can invoke the procedure of bankruptcy, she can never escape from the burden of her debts, which are not now, as formerly, payable only out of the fund existing at the particular time at which the debts were contracted. If the Married Women's Property Act had contained no provision relating to bankruptcy, the answer to the question, Can a married woman be made a bankrupt? would have been reasonably clear. It is, however, provided, that every married woman *carrying on a trade separately from her husband* shall, in respect of her separate property, be subject to the bank-

Bankruptcy
of a married
woman not a
trader.

(*p*) *Webb v. Stenton*, 11 Q. B. D. 518.

(*q*) Ord. XIV. r. 1. And see *Wilson v. Dundas*, W. N. 1875, p. 232; *Gunston v. Maynard*, Law Times, 9th June, 1883, p. 102; *Perks v. Mylrea*, W. N. 1884, p. 64.

(*r*) Cooke on the Bankrupt Laws, vol. i. p. 46, 8th ed.

(*s*) *Ex parte Jones*, 12 Ch. D. 484.

(*t*) *La Vie v. Philips*, 1 Wms. Bl. 570.

(*u*) See *Ex parte Franks*, 7 Bing. 762.

Chap. XV. ruptoy laws in the same way as if she were a *feme sole* (x); and the inference, on the principle *expressio unius exclusio alterius*, would seem to be, that in no other case, except that of a separate trader, can a married woman become a bankrupt.

Traders and
non-traders.

The legislature may have considered it expedient to extend the custom of London to the rest of the country; or it may be that the clause was inserted *ex abundante cautela*, to meet the cases which would most frequently arise. It is difficult to arrive at any satisfactory reason why the distinction between traders and non-traders should have been thus introduced, in the case of married women, at a time when the whole tendency of bankruptcy legislation was in the direction of its abolition. The Bankruptcy Act, 1883, avoids any interference with the legislation for married women, and expressly declares (y) that nothing therein contained shall affect the provisions of the Married Women's Property Act, 1882. What may be the precise effect of this saving clause is not clear, but it can scarcely be relied upon to furnish an argument either for or against the general liability of married women to the law of bankruptcy. The intention probably was to leave the decision of the question to depend entirely upon the effect of the Married Women's Property Act, 1882 (z).

The wording of the Act cannot be considered as decisive of the question, for it does not necessarily follow that, because it is specified that married women being separate traders are subject to the bankrupt laws, therefore all other married women are not so subject; and if, according to the altered law, it is natural, just and convenient that married women should possess the privileges and be subject to the liabilities of bankruptcy, it is submitted that the Courts will so decide, and will not lay so much stress upon the express provision as to separate traders, as to hold that it necessarily implies that non-traders cannot be bankrupt. Apart from this provision the question seems to come back to the apparently simple one—Can a married woman be a debtor?

(x) Sect. 1, sub-s. 5.

(z) 45 & 46 Vict. c. 75.

(y) 46 & 47 Vict. c. 52, s. 152.

This question was answered in the negative under the former law, and the following remarks of Lord Justice James in the case referred to (a) place the matter in the clearest light:—

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Position of a married woman as a debtor.

“The married woman who contracts in that way is not a debtor in any sense of the word, and she, not being a debtor, the whole foundation of the appellant’s case fails. A debtor’s summons is a summons against a debtor. The respondent is not a debtor, and therefore there was no legal authority to issue a debtor’s summons against her, and no proceedings in bankruptcy founded upon it could be effectually taken.”

Under the present law of bankruptcy, the entire jurisdiction of the Court depends upon the commission of an act of bankruptcy by a *debtor*: so that if there is no debtor, there can be no proceedings in bankruptcy. The converse is, of course, not necessarily true, that if there is a debtor, the person answering that description is liable to the bankruptcy law; but the language of the 5th section of the Bankruptcy Act is perfectly general where it enacts that, “if a *debtor* commits an act of bankruptcy, the Court may, on a petition being presented,” make a receiving order for the protection of the estate. Bankruptcy or composition then follows in due course according to circumstances, and it will be observed that, so far as the Bankruptcy Act is concerned, a married woman, *if a debtor*, is clearly within its terms. When it is remembered that the bankruptcy law confers a benefit as well as imposes a burthen, that it is not a penal code but one intended for the alleviation of pecuniary misfortune, that the policy of modern legislation is to extend the rights and liabilities of women and to abolish the distinction between traders and other persons, it seems probable that the decision of the Courts, when the point arises, will be that a married woman who is not a trader may, if all the other necessary conditions exist, be amenable to the law of bankruptcy.

It may be thought that a further argument in favour of the liability of married women to become bankrupt may be found in this, that if the clause in the Act be taken as enacting that none but a married woman trading separately from her

(a) *Ex parte Jones*, 12 Ch. D. 484.

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husband can be made bankrupt, the Act would not operate in the following case. A husband and his wife having separate property might enter into a commercial and trading partnership, having their respective interests and shares in the business defined by a partnership deed, and possessing interests as distinct, as if they were not husband and wife. In this case the wife would not be trading separately from her husband, though she would be trading, and consequently would not come within the terms of the section in the Act. She would not, therefore, be liable to be made a bankrupt, unless married women have by virtue of the new *status* given to them become subject to the liability of bankruptcy.

Extent of
separate pro-
perty.

The next subject which requires consideration is the extent of the separate property so far as it depends on statute. Before the 9th August, 1870, none existed; under the Act passed in that year, married women were declared to be entitled to some property as separate property; but the recent Act has, so far as is consistent with the vested rights of husbands, created an universal separate property. As the relative rights of husband and wife still depend to some extent on the date of the marriage, the provisions on this subject of the Act of 1870, which received the Royal Assent and came into operation on the 9th August in that year, are here summarized:—

Under the
Act of 1870.

Separate property of women married before 1st January, 1883, may consist of the following particulars:—

1. Wages or earnings acquired or gained in any separate employment, occupation or trade, and also any money or property acquired through the exercise of any literary, artistic or scientific skill. (Sect. 1.)
2. Deposits in savings banks, and annuities granted by the Commissioners for the Reduction of the National Debt in the name of a married woman. (Sect. 2.)
3. Any sum, not less than 20*l.*, forming part of the public stocks and funds standing in the books of the Bank of England in the name of a married woman, “as a married woman entitled to her separate use.” (Sect. 3.)
4. Shares or stock of companies to which no liability is attached registered in the books of the company in the

name of the married woman, "as a married woman entitled to her separate use." (Sect. 4.)

5. Any share or interest, to which no liability is attached, in any industrial and provident, friendly, benefit building or loan society entered in the books of the society in the name of the married woman, "as a married woman entitled to her separate use." (Sect. 5.)
6. Any personal property acquired by a woman married after the passing of the Act as next of kin of an intestate. (Sect. 7.)
7. Any sum of money not exceeding 200*l.* acquired by a woman married after the passing of the Act under any deed or will. (Sect. 7.)
8. The rents and profits of any freehold, copyhold or customary-hold property which descends upon a woman, married after the passing of the Act, as heiress or co-heiress of an intestate. (Sect. 8.)
9. A policy effected by a married woman on her own life or the life of her husband. (Sect. 10.)

Of these nine heads, those numbered 2 to 5 are concerned rather with the manner of holding property than with its ownership; and the rest affect but a small part of the unsettled property of married women. All property, real and personal, belonging to women before marriage, or coming to them afterwards, with the two slight exceptions relating to intestacy and amount mentioned in the above heads (6—8), was left by the Act subject to the previous law, by which, if it was not settled for the separate use of the married woman, her husband acquired by the marriage an interest therein, absolute or qualified, according to the nature of the property.

The expressions "separate use" and "separate property" seem to be indiscriminately employed throughout this Act. Thus, when by sect. 8 it is declared that the rents and profits of certain property shall belong to a married woman for her *separate use*, and by the next section a summary mode of proceeding is established for determining questions between husband and wife as to "property declared by this Act to be the *separate property* of the wife," the conclusion seems inevitable that the phrases were intended to have the same legal effect.

Terms used to express separate estate.

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In the Act of 1882 the expression generally used is "separate property," but the terms "separate estate," "her own separate property" and "entitled for her separate use," are also occasionally employed. It is to be regretted that the expression "separate property" was not appropriated to that property which a married woman holds without the intervention of a trustee, "separate use" being retained in its former signification, while "separate estate" might have been conveniently used to denote the total of both descriptions of property. But no such distinction can be found in the Act, where the several phrases seem to be used indifferently.

Separate property under the Act of 1882.

Effect of the Act on the property of women married after it.

The Married Women's Property Act, 1870, created, as has been previously mentioned, but a small amount of separate property. No such charge, however, can be made against the Act of 1882, for it enacts (*b*) that every woman who marries after the commencement of the Act (*c*) shall be entitled to have and to hold as her separate property, and to dispose of as provided by the 1st section (*d*), all real and personal property which shall belong to her at the time of the marriage, or shall be acquired by, or devolve upon, her after marriage.

This seems exhaustive; nevertheless, the section goes on to specify particular items of property in language borrowed from the Act of 1870:—

"Including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic or scientific skill."

Unless there is some value in the word "gained," so that it includes something which is not "acquired" within the meaning of the previous part of the section, the words extracted above seem to be mere surplusage. It is, perhaps, hardly necessary to notice the redundancy, except that it may assist in the interpretation of sect. 1 (*5*), concerning the bankruptcy of married

(*b*) Sect. 2.

(*c*) 1st January, 1883.

(*d*) The first section confers upon a married woman the capacity, in accordance with the provisions of

the Act, of acquiring, holding and disposing of any property as her separate property as if she were a *feme sole*.

women, suggesting the consideration that there, as here, the legislature has erred on the side of caution, by express mention of some of the circumstances which most plainly demanded legislative interference. Chap. XV.

The last preceding observations relate to women married after the 1st January, 1883. Those who were married before that date are dealt with by the fifth section of the Act as follows:— Effect of the Act of 1882 on property of women married before it.

“Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue *after* the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid.”

This section has been here set out *verbatim*, because important questions of construction are raised by the words “*her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after, &c.*” A married woman may, on the 1st January, 1883, have been entitled in contingency, reversion, or remainder to property which, after that date, became vested, either in interest or in possession. Does her *title* accrue before or after the commencement of the Act? There can be no doubt that the *title* to property *accrues* when the instrument conferring it comes into operation, and that in the case above mentioned no fresh title, in the ordinary acceptance of the word, accrues after the commencement of the Act. Suppose, for example, that by a marriage settlement, executed before the commencement of the Act, real estate was limited to the use of the husband for life, with remainder to the first and other sons of the marriage successively in tail male, with remainder to the daughters as tenants in common in tail male, with remainders over: and that on the 1st January, 1883, there were several sons and one daughter, a married woman. It is clear that however remote may have been her chance of ultimate succession, her title to the property had accrued before the commencement of the Act; and that by an acknowledged deed she might, with her husband's concurrence, have disposed of her entire interest. If afterwards, her father being dead and her brothers dead Construction of 5th section.

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without issue, and without having barred the entail, her remainder falls into possession, she acquires no new title to the property, but the purchaser of her reversionary interest becomes entitled to the property in possession, under and by virtue of the conveyance of the reversionary interest. This example will serve to show that there are not two titles, one reversionary, the other in possession; but that the *title* of the same person under the same instrument is *one*, although the *quantity* of the estate taken may vary from time to time (*e*). The wording of sect. 5, however, seems distinctly to contemplate that there may be several titles to the same property (*viz.* "vested or contingent, and whether in possession, reversion or remainder"); and that, if any one of these different titles accrues after 1882, the property is to be separate property. If this meaning of the word "title" is adopted, a different title might be said to accrue whenever the death of an intervening owner increased the interest of the reversioner or remainderman.

Terms
adapted from
clause in
marriage
settlements.

The words which give rise to the difficulty seem to have been adapted from the ordinary agreement in a marriage settlement to settle the after-acquired property of the wife; but there is this difference between the two cases, that in the one case all property to which the married woman becomes entitled *before* a certain time (*i. e.* the termination of the coverture) is affected by the covenant, and in the other all the property to which she becomes entitled *after* a fixed date (the commencement of the Act), is within the scope of the section. The words "whether in possession, reversion or remainder" in the covenant have an

(*e*) While these pages were passing through the press, the case of *Baynton v. Collins* (28 Sol. Journ. 674) was decided by Chitty, J. The views of that learned judge do not seem to coincide with those expressed above: for he held that a married woman who had, before the commencement of the Act, a vested interest in reversion, which fell into possession after that date, was entitled to it as her separate property by virtue of the 5th section

of the Act. In the course of his judgment—as yet but shortly reported—the learned judge observed that "there were five kinds of title mentioned, and if any of them accrued after the date of the Act, it came within the section;" and that the fair meaning to be attributed to the words, "the title to which shall accrue after the commencement of the Act," when referring to a title in reversion or remainder, was "accrue due in possession."

intelligible meaning, when they are employed to sweep in every species of property to which a person may become entitled *before* a certain date; but, inasmuch as a reversion or remainder, the title to which accrues *after* a fixed date, must also ripen into possession after the same date, those words in the Act are practically inoperative. Chap. XV.

If it is sought to interpret the section by regarding the spirit and policy of the measure as a whole, two opposing principles seem to present themselves. For, on the one hand, there is a manifest intention in the Act to confer even upon women married before the 1st January, 1883, as much separate property as possible; while, on the other, there seems to be an endeavour to interfere as little as possible with the vested rights of their husbands. As these two principles are somewhat inconsistent, we are driven back to the consideration of the words themselves, which must be tested by application to a few cases:—

1. If no title accrued before the Act the case is clear, and the property is "separate property."
2. If the property was vested in possession before 1st January, 1883, the case is equally clear, and the rights of the parties depend upon the old law.
3. If, before the 1st January, 1883, the title to a contingent or reversionary interest accrued to a married woman, which interest did not vest or fall into possession until after that date, the difficulty arises to which reference has been made. This head, it may be observed, includes cases of infinite diversity, from a remote and shadowy interest liable to be destroyed by the barring of an entail or the exercise of a power, to a vested remainder expectant on the life estate of a dying person.

The analogy of covenants to settle after-acquired property does not furnish much assistance towards the construction of this section, for two classes of cases may be cited leading to opposite conclusions. Thus reversionary interests which accrue during the coverture, but do not fall into possession until after its determination, have been held, when they fell into possession, Analogy of covenants to settle after-acquired property.

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to be bound by the covenant (*f*); while, on the other hand, the words "become entitled" have been held to be satisfied by the change of condition from a reversionary to a possessory interest (*g*). So long as the reversionary property, to which the wife was entitled before the 1st January, 1883, remains without change, she can, of course, only deal with it under the provisions of the former law; and it is submitted that a change from a mere contingency to a vested interest in remainder is not such an accruer of title as will be held to satisfy the words of the Act, and therefore that such a remainder will not be held to be separate property. Indeed, the better opinion seems to be that, even when property vests in possession after the commencement of the Act, but the title has accrued under an instrument which came into operation before that date, the earlier acquisition of title will prevent the operation of the Act (*h*).

Restriction on
loans by the
wife to her
husband.

Although the general scope of the Act of 1882 is to render a married woman independent of her husband, and to enable her to deal with her property in any manner she may think fit, as if she were an unmarried woman, yet in one respect the legislature seems to have considered, that the relations of husband and wife constituted such a community of interest between the parties, that a restriction should be placed on pecuniary dealings between the wife and the husband.

This is effected by the 3rd section, which is as follows:—

"Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

(*f*) *Butcher v. Butcher*, 14 Beav. 222, and cases cited *ante*, p. 251.

(*g*) *Archer v. Kelly*, 1 Dr. & Sm. 300. And see *Blythe v. Granville*, 13 Sim. 190.

(*h*) But see *Baynton v. Collins*, 28 Sol. Journ. 674. By sect. 24 the word "property" includes a

thing in action; and, therefore, things in action of the wife will be subject to the old or the new law, according as they accrue before or after the 1st January, 1883, whether they are reduced into possession or not before that date.

This section is the only instance in which this enabling statute imposes upon a married woman a restriction which did not previously exist. It appears to recognize as a fact that, notwithstanding the independent *status* and capacity conferred by the Act upon married women of dealing with their property with any person whomsoever, including their husbands, dealings by a wife with her husband with regard to her separate property are not on the same footing as her dealings with third parties, nor on the same footing as dealings by a husband with his wife; and it, therefore, endeavours to limit and restrict the lending or entrusting of property by her to him for any purpose whatsoever, by enacting that, in the case of his bankruptcy, she shall not be entitled to any dividend until all his creditors for value have been fully paid.

The words of the section apply not only to money or property lent, but also to money or property entrusted by the wife to the husband for any purpose. It would seem, therefore, that, if a wife entrust any property to her husband for any purpose, even for safe keeping, it will on his bankruptcy form part of his assets, and that her only remedy is the right of proof against his estate given by the section. Includes property entrusted for any purpose.

It seems that this section would apply not only where "the money or other estate of the wife" is vested in her without the intervention of trustees, but also when it is vested in trustees upon trust for her separate use; and, consequently, a loan of the wife's money by and in the names or through the intervention of trustees, will not place her in any better position than if the money were lent in her own name. In this respect, therefore, a married woman is in a worse position than she was under the old law: for there seems no doubt that, under that law, if the wife's separate property had been lent to her husband, then, in the event of his bankruptcy, she was entitled to prove against his estate *pari passu* with the other creditors (i).

It will be observed that there is no corresponding restriction upon the husband's right to prove, in the case of the bankruptcy of his wife, against her estate for any money or property lent or No corresponding restriction upon the husband.

(i) *Ex parte Melbourn*, L. R., 6 Ch. 64.

Chap. XV. entrusted by him to her, so that this anomaly follows, namely, that if a wife carries on a separate trade, and her husband lends or entrusts money to her, and she becomes bankrupt, he is entitled to rank for dividend *pari passu* with her other creditors, while the wife who lends or entrusts money to her husband is not, in the event of his bankruptcy, entitled to rank for dividend, until after all his other creditors for value have been satisfied.

The intention of the legislature appears to have been that if a wife lent or entrusted her property of any kind to her husband, that property should, in the event of his bankruptcy, be applicable only in payment of his creditors for value, and that after they were satisfied, the wife might recover the amount or value of her property from the estate then remaining. But this is not the result of the section.

Provisions of
the Bank-
ruptcy Act,
1883.

The Bankruptcy Act, 1883 (*j*), enacts that, subject to the provisions of the Act, all debts proved in the bankruptcy shall be paid *pari passu*. Under a precisely similar clause in the Act of 1869 (*k*), it was held that in a bankruptcy creditors on voluntary bonds or covenants were entitled to receive dividends *pari passu* with creditors for valuable consideration (*l*).

Hence the question arises, What is the effect of this section and decision upon the position of a married woman who has made a loan or entrusted property to her husband?

By the Married Women's Property Act, 1882, money or other property lent or entrusted by the wife to the husband becomes, on his bankruptcy, assets of his estate, with the right to her to rank against that estate for payment after creditors for valuable consideration. By the Bankruptcy Act, 1883 (*m*), and the decision in *Ex parte Pottinger* (*n*), voluntary creditors and creditors for value rank equally against the debtor's estate. It therefore seems that the husband's voluntary creditors are entitled to be paid out of his estate, which includes money or property lent or entrusted to him by his wife, *pari*

(*j*) 46 & 47 Vict. c. 52, s. 40, 621.
sub-s. 4.

(*k*) 32 & 33 Vict. c. 71, s. 32.

(*l*) *Ex parte Pottinger*, 8 Ch. D.

(*m*) 46 & 47 Vict. c. 52, s. 40,
sub-s. 4.

(*n*) *Ex parte Pottinger*, *ubi supra*.

passu with his creditors for value, in priority to any repayment to the wife.

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Such a distribution, however, would, it seems, be contrary to the intention of this section of the Married Women's Property Act, 1882, which points to repayment to the wife after creditors for value only have been satisfied.

Where a married woman, a creditor of her husband, entitled to rank for repayment.

Where, then, does the wife's claim for repayment of property lent or entrusted by her to her husband rank?

Is she entitled to rank upon the estate *pari passu* with all the other creditors of her husband both voluntary and for value? This would appear to be clearly not intended, as the section carefully specifies that she is to be paid "after, but not before" creditors for value.

Or are the two classes of creditors voluntary and for value to be treated as separate and not ranking *pari passu*, thus disregarding the decision of the Court of Appeal in *Ex parte Pottinger* (o), and is the wife entitled to rank next after the creditors for value and before the voluntary creditors, or next after the creditors for value but *pari passu* with voluntary creditors? It is hardly conceivable that either of these alternative views can be correct, for the result would be that in the case of the bankruptcy of a married man, the accident that his wife had lent him money or other property would not only alter the order of the distribution of his estate among his creditors, but by postponing voluntary creditors to creditors for value, would increase the fund available for payment of the latter class at the expense of the former.

Or is the wife entitled to rank only after all other creditors, both voluntary and for value, have been satisfied? This may be the case; but if so, it is a direct contradiction of the terms of the section, which specify that her claim to a dividend is to rank "after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

This section seems to have been suggested by, if not copied from, the 5th section of the Act to amend the Law of Partner-

This section taken from 28 & 29 Vict. c. 86.

Chap. XV. ship (28 & 29 Vict. c. 86), an Act which received the Royal Assent on the 5th July, 1865. At that date proceedings in bankruptcy were regulated by the Act of 1861 (24 & 25 Vict. c. 134), which contained no provision that all debts proveable in bankruptcy should be paid *pari passu*; and, "according to the well-established law, practice and principles of the Court of Bankruptcy," a voluntary bond or covenant was, before the Act of 1869, postponed to what are called "onerous obligations." The enactment, therefore, defining the rights of partnership creditors was, when it was passed, capable of receiving a reasonable construction. Now it has become as difficult to construe as the section of the Married Women's Property Act which appears to have been founded upon it.

Married
woman a
trustee.

Under the old
law.

The effect of the Act upon the position of a married woman who is a trustee may now be briefly considered.

Under the former law it was inexpedient to select as a trustee a married woman, or any woman likely to marry; not that the disability of coverture prevented a woman from executing the trusts and powers, but because the appointment was attended by several practical inconveniences. In the first place, the husband, being liable for the breaches of trust committed by his wife, was naturally anxious to superintend her administration, and thus became in fact the trustee instead of his wife. Secondly, where land was the subject of the trust, deeds appointing new trustees or conveying the land to the *cestui que trust* required to be acknowledged by the married woman; as, without complying with the statutory formalities, she had no power of passing the legal estate (*p*). Thirdly, if the trust involved the exercise of a power of sale, there was much difficulty in obtaining the proper receipt for the purchase-money. "If it be paid to the husband it passes into the hands of a stranger, and if it be paid to the wife, the law immediately transfers it to the husband, who is a stranger" (*q*).

Power to convey the legal estate under 37 & 38 Vict. c. 78.

The power of conveying the legal estate in certain cases was indeed conferred upon married women by the Vendor and Pur-

(*p*) See *Cahill v. Cahill*, 8 A. C. 420.

(*q*) Lewin on Trusts, 7th ed. 33.

chaser Act, 1874 (*r*), which, by the 6th section, enacts that when any freehold or copyhold hereditaments shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*. This enactment, however, does not extend to leaseholds, and, moreover, considerable uncertainty prevails as to the precise meaning of the words "bare trustee."

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"The term is generally considered to be ambiguous; but it will probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, and has been requested by them so to convey it" (*s*).

Meaning of term "bare trustee."

Vice-Chancellor Hall, in a case (*t*) which involved the construction of the same words in another section of the Act, approved of this statement, leaving out, however, the words "and has been requested by them so to convey it," which he regarded as introducing an "ingredient" neither important nor necessary to a person being a bare trustee; whereas in a subsequent case (*u*), Jessel, M. R., said that if those words were left out, he was "utterly at a loss to make out any meaning of it at all." That eminent judge, while expressly abstaining from giving a judicial opinion, indicated that he differed from the authorities already cited, and regarded a "bare trustee" as a trustee without any beneficial interest.

Unless a married woman was a "bare trustee," whatever meaning may be ultimately given to that expression, she could only convey freeholds with the concurrence of her husband, and by deed acknowledged; and the recent Act leaves her position as a trustee in a state of considerable doubt.

We have seen that there were three practical drawbacks to the appointment of a married woman as a trustee. Of these, the first is clearly removed by the Act, which, by the 24th section, declares that the word "contract" in the Act shall include the

Effect of the Act of 1882.

(*r*) 37 & 38 Vict. c. 78.

279.

(*s*) Dart, V. & P. 5th ed. 517.

(*u*) *Morgan v. Swansea Sanitary*

(*t*) *Christie v. Ovington*, 1 Ch. D. Authority, 9 Ch. D. 582.

Chap. XV. acceptance of any trust, or of the office of executrix or administratrix; and that the provisions of the Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage; and that her husband shall not be subject to such liabilities, unless he has acted or intermeddled in the trust or administration. The third objection to the appointment of a married woman to be a trustee disappeared with the marital right during the coverture; and there remains, therefore, only the question as to the legal estate. The enabling section of the Act, which confers upon a married woman the power of acquiring, holding, and disposing of property, is clearly inapplicable to an estate held upon trust. The words "without the intervention of any trustee" point exclusively to beneficial interest; and, inasmuch as the property is to be "her separate property," and is expressly declared to be liable to damages and costs in respect of her contracts and torts (*x*), there can be little doubt that a trust estate cannot be "separate property." Moreover, the 18th section expressly provides for the case of a married woman being a trustee, but omits to endow her with the power of dealing with the legal estate in land. It enacts as follows:—

"A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*."

This section enables a married woman to do, as trustee, what she might have done without its authority, if "separate property" included trust property; and thus furnishes a very strong argument against the application of the Act to a legal estate in land held upon trust. This conclusion is unsatisfactory and cannot have been intended; but until the contrary has been

(*x*) Sect. 1 (2). See also sects. 7, 13.

judicially decided, it is submitted that a married woman trustee (not being a "bare trustee") must, in the case of freeholds, acknowledge the deed by which she conveys the legal estate, and obtain the concurrence of her husband therein; and in the case of leaseholds, the husband must be, as before the Act, a conveying party.

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The privilege of holding separate property has been conferred on a married woman, but the grant has been accompanied by the imposition of statutory liabilities. At common law a married woman could not be sued either in contract or in tort, the plea of coverture being a complete answer to the action. Her legal liability, therefore, at the present day, depends entirely upon statute; and the consequences of that liability will be found, as in the case of a man, to be measured by the extent of her property.

Liabilities
imposed on
married
women.

We shall now proceed to give an outline of the successive enactments by which a married woman has been rendered liable to an action.

Under the Divorce and Matrimonial Causes Act, 1857 (*y*), a married woman who had obtained a decree of judicial separation or a protection order was placed in the position of a *feme sole* for the purposes of contracts and wrongs and injuries, and of suing and being sued in any civil proceeding; and her husband was not liable in respect of any engagement or contract she might have entered into, or for any wrongful act or omission by her, or for any costs she might incur as plaintiff or defendant. But it was not until the Act of 1870 was passed, which, as has been already stated (*z*), recognized, to a limited extent, the existence of separate property, that liabilities were imposed on married women generally. By that Act a wife, married on or after the 9th August, 1870, was rendered liable to be sued for her ante-nuptial debts as if she had continued unmarried (*a*). The husband was released from all liability, and the separate property of the wife became the only fund available for such creditors. Any married woman having separate property was, by the same Act, liable to main-

The Divorce
and Matrimonial Causes
Act, 1857.

The Married
Women's
Property Act,
1870.

Ante-nuptial
debts.

Maintenance
of husband
and children.

(*y*) 20 & 21 Vict. c. 85.

(*z*) *Ante*, p. 404.

(*a*) Sect. 12.

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tain her husband (*b*) and children (*c*) if they became chargeable to any union or parish.

The Married
Women's
Property Act,
1874.

After four years it was discovered that "it was not just that the property which a married woman had at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage (*d*);" and, accordingly, the liability of the husband in respect of such debts was restored to the extent of certain assets received by him in the character of husband (*e*). But the primary liability of the wife's separate estate was not affected by that Act, except that it might have to bear the additional burthen of the husband's costs of defence (*f*). The husband's liability existed only during the marriage; for, as the Act provided that the husband and the wife should be sued jointly, no action would, after the death of the wife, lie against the husband alone, notwithstanding that he had received assets from his wife (*g*).

This Act was not retrospective, and, accordingly, husbands married between the 9th August, 1870, and the 30th July, 1874, continued to enjoy complete immunity in respect of their wives' ante-nuptial debts and contracts (*h*).

The Married
Women's
Property Act,
1882.

The Married Women's Property Act, 1882, does not enact in so many words that the disability of coverture shall, as to women married on or after the 1st January, 1883, cease and determine; but its whole scope is to place a married woman in the position of an unmarried woman, and its clauses contain a detailed enumeration of her privileges and liabilities. Her privileges have been already discussed; her liabilities under the Act may be summarized as follows:—

1. She can contract, and sue or be sued in contract or in tort or otherwise. (Sect. 1 (2).)
2. She may be made a bankrupt, at all events, if she is a separate trader. (Sect. 1 (5).)

(*b*) Sect. 13.

Ch. D. 811.

(*c*) Sect. 14.

(*f*) *London and Provincial Bank*

(*d*) Married Women's Property

v. Bogle, 7 Ch. D. 773.

Act, 1874, Preamble.

(*g*) *Bell v. Stocker*, 10 Q. B. D. 129.

(*e*) *Ibid.* s. 5. See Act in Ap-

(*h*) *Conlon v. Moore*, Ir. Rep.,

pendix. *Matthews v. Whittle*, 13

9 C. L. 190.

3. She may hold shares in companies and other property to which liability is attached. (Sects. 6, 7.)
4. She is liable, not only for her ante-nuptial debts as before the Act, but also in respect of ante-nuptial contracts and torts, and as a contributory to the assets of a joint stock company. (Sect. 13.)
5. She is liable to the parish for the maintenance of her husband and children as before the Act, and also for the maintenance of her grandchildren. (Sects. 20, 21.)
6. She is liable for breaches of trust and devastavits committed either before or after her marriage. (Sect. 24.)

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These liabilities are limited, it is true, by the amount of her separate property; but the liability of a man is subject to the same practical limitation; and it is difficult to imagine a case where a woman with property will escape from liability where a man under similar circumstances would be bound.

Under this Act the husband is liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies, to the extent of all property belonging to his wife "which he shall have acquired or become entitled to" through her, after deducting any payments made by him in respect of any such liabilities of hers (*i*); but a right of action is given against the husband alone, as well as against the husband and wife jointly (*k*). The liability of the husband will, therefore, continue after the marriage is at an end if he has derived any property from his wife; since, however, he will, as the law now is, only acquire property through her by way of gift, it is not probable that the question will be of much practical importance.

Liability of the husband for the ante-nuptial obligations of the wife.

It appears, therefore, that a husband married before August 9th, 1870, is subject to his common law responsibility in respect of his wife's ante-nuptial liabilities; that a husband married between that date and July 30th, 1874, is not liable at all for his wife's ante-nuptial debts or contracts; that a husband married between July 30th, 1874, and January 1st, 1883, is liable during

Summary of legislation.

(*i*) Married Women's Property Act, 1882, s. 14. (*k*) *Ibid.* ss. 14, 15.

Chap. XV. the marriage for his wife's ante-nuptial debts, torts and contracts to the extent of her property received by him; and that a husband married since December 31st, 1882, is liable for such debts, wrongs and contracts to the extent of property received by him from his wife.

Effect of the repeals of the earlier Acts by the Act of 1882.

The Act of 1882 repeals the two earlier Acts; but the repeal is not to affect any act done or right acquired while either of those Acts was in force, nor is it to affect the right or liability of any husband or wife, married before it came into force, to sue or be sued under the provisions of those Acts for or in respect of any debt, contract, wrong or any other matter in respect of which any right or liability shall have accrued to or against such husband or wife before the Act of 1882 came into operation.

Rights of the husband on the death of the wife.

This chapter may be appropriately concluded with a discussion of the important question, whether any alteration has been effected by the Married Women's Property Act, 1882, in the rights of a husband after the death of his wife intestate in respect of her property. These rights, as they existed before the Act, were as follows:—

1. An estate for life, as tenant by the curtesy, in his wife's land.
2. An absolute interest in her undisposed of personal estate, either as administrator or *jure mariti*.
3. The right to be his wife's administrator, whether she appointed executors or not.

i. Curtesy.

In the first place, as to tenancy by the curtesy. The conditions under which a husband is entitled to this estate have been already described (*l*), and it is sufficient here to recall the fact that curtesy arises as well in equitable as in legal estates, and whether the wife is entitled for her separate use or not (*m*). The extension of the rights of the husband to equitable estates seems to dispose of any difficulty, which might otherwise have been felt, in attributing to the husband an estate by the curtesy in separate property under this Act. Curtesy was undoubtedly, in its feudal origin, the continuation after the

(*l*) *Ante*, p. 150.

(*m*) *Cooper v. Macdonald*, 7 Ch.D. 288, and cases there cited.

wife's death of the inchoate right acquired during the coverture and, accordingly, it seems a violation of principle that, in the case of an estate settled upon the wife for her separate use, where there could be no such inchoate right, the husband's curtesy should arise like a life estate in remainder expectant upon the death of the wife. The law, however, on this point may be regarded as settled, and disposes of an argument which might otherwise have been adduced against the husband's curtesy in separate property under the Act of 1882.

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As regards personal estate, the husband's rights on the death of his wife seem to have formerly been the same (subject, of course, to the wife's power of alienation) in the case of separate estate as in the case of personalty not settled to her separate use. Thus, cash or bank notes (*n*), and also, it seems, leaseholds (*o*), of the wife passed to the surviving husband without his being bound to take out administration to her estate; while in the case of choses in action he could only recover them as her administrator. If the wife made a will disposing of her separate estate, and appointing executors, it seems that the executor would hold any separate personalty undisposed of, upon trust for the husband; subject, however, to payment of her debts contracted on the faith of her separate estate (*p*). Is there anything in the recent Act to deprive the husband of the right to his deceased wife's personal estate? The marital right is certainly excluded during the coverture, but there is no provision which makes a woman's property devolve as if she were a *feme sole* (*q*). In default of express enactment, the qualities of "separate property," including its devolution on intestacy, must be regarded as identical with those of property held in trust for the separate use of a married woman (*r*).

ii. Personalty
undisposed of.

As regards the right to administration, it must be admitted

iii. Adminis-
tration.

(*n*) *Molony v. Kennedy*, 10 Sim. 254; *Tugman v. Hopkins*, 4 Man. & Gr. 389; *Johnstone v. Lumb*, 15 Sim. 308.

(*o*) *Ante*, p. 147.

(*p*) *Owens v. Dickenson*, Cr. & Ph. 48.

(*q*) See also upon this subject *ante*, p. 390.

(*r*) In several sections of the Act "separate property" includes property held in trust for the separate use of a married woman. See sects. 13, 15, 20, 21.

Chap. XV. that there is considerable difficulty in reconciling the provisions of the Act of 1882 with the previous law on the subject. It is strange that so important a subject as the right to administration should not have been made the subject of express enactment; but there is none such in the Act, and the new law, if any change has been made, has to be discovered by inference.

Legal personal representative of a married woman.

Before the recent Act, the expression "legal personal representative of a married woman" could only mean her husband, who had taken out letters of administration. Her executors in no sense represented her personality. They took only such property as was expressly bequeathed to them, they were not answerable for her ante-nuptial debts, and the grant of probate did not preclude the husband from obtaining letters of administration. He was the only person who could continue the personality which had during life been merged in his own; and accordingly his right to administration—in the absence of a protection order or a judicial separation—was absolute.

Has this been changed by the Act of 1882? The twenty-third section is the only enactment which bears on the point. It is as follows:—

"For the purposes of this Act, the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities, and be subject to the same jurisdiction, as she would be if she were living."

This section is remarkable in several respects. It enacts that the personal representative of any married woman shall have the same rights, &c., as she would *be* if living. It may be assumed that the section is intended to be read as if it stood thus: "shall have the same rights and liabilities *as she would have*, and be subject to the same jurisdiction as she would be, if she were living." But setting this aside, it may be observed, in the next place, that the section is not limited, either expressly or by implication, to personal estate, so that the personal representative of a married woman is entitled to her real estate, and therefore the devolution of a married woman's real estate seems for the future to be regulated by the rules relating to personality. But, whatever may have been the intention of the Legislature in

this respect, it is also remarkable that the section contains no hint or suggestion that the legal personal representative is to take the separate estate otherwise than beneficially. It is, indeed, true that the rights are conferred upon him "for the purposes of this Act"; but one of the principal purposes of this Act is to enable a married woman to take beneficially, and the legal personal representative is to have the *same* right as the married woman would have if living. If the mind be divested of the idea that a personal representative must necessarily be in a fiduciary position, there can be little doubt that, if the section be taken literally, a beneficial interest is conferred upon him.

It is improbable that the judges, in interpreting this section, will consider themselves bound by the literal meaning of its words. The "golden rule" of construction was stated by Lord Wensleydale in the following terms:—

"In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further" (s).

In order to avoid the absurdities which follow from a literal reading of this section, the Courts will probably encroach upon the province of the Legislature, and will arrive at conclusions consonant with the general intention of the Act, though possibly at variance with the grammatical meaning of the words.

It is submitted that the position of the legal personal representative of a married woman will be held to be that of a trustee, and that the beneficial interest in the property of a married woman will on her death devolve in the same manner as before the commencement of the Act. But whether the legal estate in her freeholds will vest in her legal personal representative, and what may be the precise rights conferred and liabilities imposed by the section, are questions which must be left to the determination of the Courts.

(s) *Grey v. Pearson*, 6 H. L. Cas. 61, 106. See also *Caledonian Rail. Co. v. North British Rail. Co.*, 6 App. Cas. 114; *Ex parte Walton*, 17 Ch. D. 746.

APPENDIX.

THE MARRIED WOMEN'S PROPERTY ACT, 1870.

33 & 34 VICT. c. 93.

An Act to amend the Law relating to the Property of Married Women. [9th August, 1870.]

WHEREAS it is desirable to amend the law of property and contract with respect to married women :

Be it enacted * * * * as follows :

1. The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation or trade in which she is engaged or which she carries on separately (a) from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic or scientific skill, and all investments of such wages, earnings, money or property, shall be deemed and be taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money and property.

Earnings of married women to be deemed their own property.

See pp. 19, 329, 404.

(a) See *Ashworth v. Outram*, 5 Ch. D. 923, and *ante*, p. 329; *Lovell v. Newton*, 4 C. P. D. 7, and *ante*, p. 331. Separate property under this Act becomes, upon the death of a married woman, equitable assets, and divisible among her creditors *pari passu*; *Re Poole's Estate*, 6 Ch. D. 739. In an action to charge a married woman's separate earnings it was necessary to join her husband as defendant; *Hancock v. Lablache*, 3 C. P. D. 197.

2. Notwithstanding any provision to the contrary in the Act of the tenth year of George the Fourth, chapter twenty-four, enabling the commissioners for the reduction of the national debt to grant life annuities and annuities for terms of years, or in the Acts relating to savings banks and post-office savings banks, any deposit hereafter made and any annuity granted by the said commissioners under any of the said Acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant,

Deposits in savings banks by a married woman to be deemed her separate property.

Proviso.

shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such deposit or annuity or any part thereof to be paid to the husband.

See pp. 19, 404.

As to a married woman's property in the funds.

3. Any married woman, or any woman about to be married, may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband.

See pp. 19, 29, 377, 404.

This provision did not enable a married woman to transfer stock without the concurrence of the husband until it had been registered in her name in the specified manner; *Howard v. Bank of England*, L. R., 19 Eq. 295.

As to a married woman's property in a joint-stock company.

4. Any married woman, or woman about to be married, may apply in writing to the directors or managers of any incorporated or joint stock company that any fully paid up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company, in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends

and profits paid as if she were an unmarried woman ; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

See pp. 19, 29, 404.

A company was held bound to register, if required, unless they could show a flaw in the married woman's title ; *The Queen v. Carnatic Rail. Co.*, L. R., 8 Q. B. 299.

5. Any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit or debenture no liability is attached and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman ; provided that if any such share, benefit, debenture, right or claim has been obtained by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in a society.

See pp. 19, 29, 405.

6. Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by savings banks or moneys invested in the funds or in shares or stock of any company shall, as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed.

Deposit of moneys in fraud of creditors invalid.

7. Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum

Personal property not exceeding 200*l.* coming

to a married woman to be her own.

of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

See pp. 19, 405.

In *Re Voss*, 13 Ch. D. 504, a sum of £600 Consols devolved on a married woman as next of kin of an intestate; it was held that she was entitled to the whole for her separate use, and that it would be transferred to her without the necessity of any examination. See also *Lane v. Oakes*, 22 W. R. 709.

Freehold property coming to a married woman, rents and profits only to be her own.

8. Where any freehold, copyhold or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

See pp. 20, 60, 405.

In *Re Voss*, 13 Ch. D. 504, it was suggested that this provision might apply to the corpus of the property, as the rents and profits were not limited to those arising during the life of a married woman.

How questions as to ownership of property to be settled.

9. In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply, by summons or motion in a summary way, either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property) the judge of the county court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs as he shall think fit; provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been, and the judge may, if either party so require, hear the application in his private room.

Married woman may effect policy of insurance.

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman. A policy of insurance effected by any married man on his own life, and expressed upon the face of it (a) to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for

As to insurance of a husband for benefit of his wife.

the benefit of his wife for her separate use, and of his children, or any of them (b), according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate (c). When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid (c).

See pp. 296, 298, 405.

A policy effected by a married woman under this section must be expressed on the face of it to be for her separate use. This is not necessary under the Married Women's Property Act, 1882, sect. 11.

(a) Notwithstanding these words it was held in *Newman v. Belsten*, 28 S. J. 301, where a married man insured his life, but died intestate before the policy was made out, that parol evidence was admissible to prove that the policy was intended to be effected for the benefit of his wife and children, though the proposal form contained no such statement.

(b) *Re Mellor's Policy Trusts*, 6 Ch. D. 127; 7, Ch. D. 200; *Re Adams' Policy Trusts*, 23 Ch. D. 525.

(c) *Holt v. Everall*, 2 Ch. D. 266.

11. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman: and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

Married woman may maintain an action.

See pp. 330, 386.

The benefit of this section was limited to actions and remedies "for the protection and security" of a married woman's separate property. *Summers v. City Bank*, L. R., 9 C. P. 580.

Husband not to be liable on his wife's contracts before marriage.

12. A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried.

See pp. 73, 376, 417.

In *Sanger v. Sanger*, L. R., 11 Eq. 470, it was held that property of the wife, to which she was at the time of the marriage entitled for her separate use without power of anticipation, was liable to her debts.

Married woman to be liable to the parish for the maintenance of her husband.

13. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the thirty-third section of "The Poor Law Amendment Act, 1868," they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by such and the same actions and proceedings as money lent.

See pp. 80, 418.

Married woman to be liable to the parish for the maintenance of her children.

14. A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children: provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children.

See pp. 82, 418.

This did not apply to grandchildren; *Coleman v. Overseers of Birmingham*, 6 Q. B. D. 615.

Commencement of Act.

15. This Act shall come into operation at the time of the passing of this Act.

Extent of Act.

16. This Act shall not extend to Scotland.

Short title.

17. This Act may be cited as the "Married Women's Property Act, 1870."

THE MARRIED WOMEN'S PROPERTY ACT (1870)
AMENDMENT ACT (1874).

37 & 38 VICT. c. 50.

An Act to amend the Married Women's Property Act, 1870.

[30th July, 1874.

WHEREAS it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment :

Be it enacted * * * * as follows :

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt. Husband and wife may be jointly sued for her debts before marriage.

See pp. 74, 76.

The effect of this section was that a husband was not liable after his wife's death for her ante-nuptial debts; *Bell v. Stocker*, 10 Q. B. D. 129.

2. The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned. Extent to which husband liable.

See p. 74.

In an action against a husband under this section it is sufficient simply to allege that he is liable; *Matthews v. Whittle*, 13 Ch. D. 811.

3. If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife. If husband without assets he shall have judgment for costs.

See p. 75.

A plaintiff is entitled to add the costs of the husband's successful defence to his debt, and to recover them against the estate of the wife. *London and Provincial Bank v. Bogle*, 7 Ch. D. 773.

Joint and
separate judg-
ment against
husband and
wife for debt.

4. When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

See p. 75.

Assets for
which hus-
band liable.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows:

- (1.) The value of the personal estate in possession of the wife which shall have vested in the husband:
- (2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession:
- (3.) The value of the chattels real of the wife which shall have vested in the husband and wife:
- (4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received:
- (5.) The value of the husband's estate or interest in any property real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person:
- (6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors:

Provided that when the husband after marriage pays any debt of his wife or has a judgment *bonâ fide* recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.

See pp. 78, 418.

The words "subsequent action," were held to mean any action commenced subsequently to the time of bringing the action in which judgment has been recovered; *Fear v. Castle*, 8 Q. B. D. 380.

Extent of Act. 6. This Act shall not extend to Scotland.

Short title. 7. This Act may be cited as the "Married Women's Property Act (1870) Amendment Act, 1874."



THE MARRIED WOMEN'S PROPERTY ACT, 1882.

45 & 46 VICT. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870):"

Be it enacted * * * * as follows :

1. (1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

Married woman to be capable of holding property and of contracting as a feme sole.

See pp. 115, 149, 304, 387, 390.

As to the effect of this sub-section upon the status of a married woman, see the observations of Chitty, J., in *Mander v. Harris*, 24 Ch. D. 222; reversed, 32 W. R. 941. And as to the effect of the section generally, see pp. 293, 294, 341.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

See pp. 91, 92, 98, 99, 115, 376, 380, 392, 393, 394, 395, 418.

The words "in respect of and to the extent of her separate property" do not limit the whole sub-section: they define the property which a married woman can render liable on her contracts, but do not qualify the capacity given to her of entering into, and of suing or being sued on contracts; *Perks v. Mylrea*, W. N. 1884, 64, following *Gunston v. Maynard*, L. T. Journal, 1883, 102, and overruling *Moore v. Mulligan*, W. N. 1884, 34.

A married woman can maintain an action for tort committed before the Act (*James v. Barraud*, 31 W. R. 786; *Weldon v. Rivière*, W. N. 1884, 154; *Weldon v. Winslow*, W. N. 1884, 184), and without giving security for costs; *Severance v. Civil Service Supply Association*, 48 L. T. 485; *Threlfall v. Wilson*, 8 P. D. 18. The action must be brought within the period prescribed by the Statute of Limitations, calculated from the date

Torts.

Contracts.

of the commencement of the Act; *Weldon v. Neal*, 32 W. R. 328. But in the case of contracts, the section confers a future capacity only, and an action can only be brought upon a contract entered into subsequently to the commencement of the Act. See *Conolan v. Leyland*, 28 S. J. 738.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

See pp. 95, 98, 103, 310, 392, 393, 396.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

See pp. 92, 98, 99, 392, 393, 397.

This sub-section was held by Chitty, J., to be not retrospective; *Conolan v. Leyland*, 28 S. J. 738. But see *Bursill v. Tanner*, 32 W. R. 827, where it was held that on a contract entered into before the 1st January, 1883, execution might issue against a married woman in respect of such separate estate as she had at the time of the judgment as well as at the time of the contract. *Sed quære*.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

See pp. 115, 321, 401, 418.

The question of the liability of a married woman, not a trader, to the bankruptcy laws, is fully discussed *ante*, p. 401. It may be observed, that if a married woman, being a trader, is made a bankrupt, all her creditors, and not only her trade creditors, will be entitled to prove in the bankruptcy.

Property of a woman married after the act to be held by her as a feme sole.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

See pp. 149, 293, 294, 330, 406.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's

estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

See p. 410.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Execution of general power.

See pp. 99, 304, 310, 398.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

See pp. 45, 294, 304, 330, 407.

A marriage settlement made in 1862 contained a covenant for the settlement of the after-acquired property of the wife, from which interests settled or limited to her separate use and disposal were excluded. The wife became entitled under the will of her mother, who died 14th January, 1883, to her residuary personal estate. It was held by Pearson, J., that the effect of sect. 19 of this Act was to exclude the operation of this section, and that the residuary personal estate so acquired by the wife was bound by the covenant, and was not separate property within the exception contained in the covenant; *Re Stonor's Trusts*, 24 Ch. D. 195. As to the construction of this section, see *Baynton v. Collins*, 28 S. J. 674, and *ante*, p. 407.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such

As to stock, &c. to which a married woman is entitled.

married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

See pp. 78, 294, 295, 419.

As to stock,
&c. to be
transferred,
&c. to a mar-
ried woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

See pp. 78, 294, 295, 419.

Investments
in joint names
of married
women and
others.

8. All the provisions hereinbefore contained as to deposits in any post-office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the

public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

See pp. 294, 295.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

As to stock, &c. standing in the joint names of a married woman and others.

See pp. 294, 295.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture or debenture stock of any corporation, company or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed owner-

Fraudulent investments with money of husband.

ship of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

See pp. 294, 295, 296.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

See pp. 294, 296, 299, 300, 301.

See notes to section 10 of the Married Women's Property Act, 1870: and as to the effect of the section see *ante*, p. 296.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Remedies of married woman for protection and security of separate property.

See pp. 86, 88, 89, 330, 376, 378, 381, 394, 395.

As to the evidence of husband and wife against each other, see *Reg. v. Brittleton*, W. N. 1884, 62, and 47 & 48 Vict. c. 14, *post*.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which

Wife's ante-nuptial debts and liabilities.

she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

See pp. 77, 419.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid ; but he shall not be liable for the same any further or otherwise ; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property : Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

See pp. 76, 78, 142, 153, 419.

Suits for ante-nuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them ; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him ; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property ; and as to the residue,

if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

See pp. 79, 142, 153, 377, 380.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Act of wife
liable to
criminal
proceedings.

See pp. 86, 88, 89, 381, and 47 & 48 Vict. c. 14, *post*.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the division in which either party resides, and the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said Court would be; and any order of a County or Civil Bill Court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same Court would be, and all proceedings in a County Court or Civil Bill Court under this section in which, by reason of the value of the property in dispute, such Court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such

Questions
between hus-
band and wife
as to property
to be decided
in a summary
way.

proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

See pp. 381, 382.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

See pp. 100, 416.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

See pp. 315, 316, 321.

As to the effect of this section, see *Re Stonor's Trusts*, 24 Ch. D. 195, and note to sect. 5, *ante*.

Married woman to be liable to the parish for the

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty

sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

maintenance of her husband.

31 & 32 Vict. c. 122.

See pp. 80, 419.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Married woman to be liable to the parish for the maintenance of her children.

See pp. 82, 83, 289, 419.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

See pp. 73, 330, 382, 420.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Legal representative of married woman.

See pp. 146, 383, 399, 423.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the

Interpretation of terms.

provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or inter-meddled in the trust or administration. The word "property" in this Act includes a thing in action.

See pp. 31, 92, 98, 101, 118, 143, 144, 415, 419.

When a married woman is administratrix her husband need not now join in the administration bond; *In the Goods of Ayres*, 8 P. D. 168.

- Commence-
ment of Act. 25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.
- Extent of Act. 26. This Act shall not extend to Scotland.
- Short title. 27. This Act may be cited as the Married Women's Property Act, 1882.



THE MARRIED WOMEN'S PROPERTY ACT, 1884.

47 & 48 VICT. c. 14.

An Act to amend the sixteenth section of the Married Women's Property Act, 1882. [23rd June, 1884.]

WHEREAS by section sixteen of the Married Women's Property Act, 1882, a wife is, under the circumstances therein mentioned, declared to be liable to criminal proceedings by her husband, and a doubt has arisen as to whether the husband is admissible as a witness against his wife in such criminal proceedings, while section twelve of the same Act declares that in any proceeding under that section a husband or wife shall be competent to give evidence against each other; and it is desirable that the said doubt should be removed, and the said Act otherwise amended:

Be it therefore enacted * * * * as follows:

- Husband or
wife com-
petent witness
in criminal
proceedings
under 45 & 46
Vict. c. 75.
1. In any such criminal proceeding against a husband or a wife as is authorized by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence.

2. This Act may be cited as the Married Women's Property Act, Short title. 1884, and this Act and the Married Women's Property Act, 1882, may be cited together as the Married Women's Property Acts, 1882 and 1884.

See pp. 381, 396.

◆

THE SECTIONS OF THE FINES AND RECOVERIES
ACT (3 & 4 WILL. IV. c. 74) RELATING TO ALIEN-
ATIONS BY MARRIED WOMEN WITH THEIR
HUSBANDS' CONCURRENCE.

—

*An Act for the Abolition of Fines and Recoveries, and for the
Substitution of more simple Modes of Assurance.*

[28th August, 1833.]

GENERAL ENABLING CLAUSE.

77. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case (except that of being tenant in tail, for which provision is already made by this Act), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender or extinguish any estate which she alone, or she and her husband, in her right, may have in any lands of any tenure, or in any such money as aforesaid (a), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this Act shall not extend to lands held by copy of Court-roll of or to which a married woman, or she and her husband, in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her, in concurrence with her husband, by

A married woman, with her husband's concurrence, may dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein: and may release and extinguish powers as a feme sole.

Not to extend to copyholds in certain cases.

surrender into the hands of the lord of the manor of which the lands may be parcel.

(a) Contingent and other like interests and rights of entry, and disclaimers of interests of married women, are made alienable by deed under the 8 & 9 Vict. c. 106.

SAVING OF POWERS.

The powers of disposition given to a married woman by this Act not to interfere with any other powers.

78. Provided always, and be it further enacted, That the powers of disposition given to a married woman by this Act shall not interfere with any power which, independently of this Act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

ACKNOWLEDGMENT OF DEEDS.

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

79. And be it further enacted, That every deed to be executed by a married woman for any of the purposes of this Act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the Superior Courts at Westminster, or a Master in Chancery, or before two (a) of the perpetual commissioners, or two (a) special commissioners, to be respectively appointed as hereinafter provided.

(a) By the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7, one commissioner is rendered sufficient. See this section, *post*.

SEPARATE EXAMINATIONS.

The judge, &c., before receiving such acknowledgment, to examine her apart from her husband.

80. And be it further enacted, That such judge, Master in Chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender or extinguishment shall be made by her under this Act, shall examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed; and unless she freely and voluntarily consent to such deed shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.

PERPETUAL COMMISSIONERS.

As to the appointment of perpetual commissioners

81. And be it further enacted, That, for the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief

Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

POWER OF PERPETUAL COMMISSIONERS.

82. Provided always, and be it further enacted, That any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

Power of perpetual commissioners not confined to any particular place.

SPECIAL COMMISSIONERS.

83. And be it further enacted, That, in those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this Act before a judge or a Master in Chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that Court, to issue a commission specially appointing any persons therein named to be commissioners (a) to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: Provided always, that every such commission shall be made returnable within

If, from being beyond seas, &c., a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

such time, to be therein expressed, as the said Court or judge shall think fit.

(a) By the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 7, one commissioner is rendered sufficient. See the section, *post*.

MEMORANDUM OF ACKNOWLEDGMENT.

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned.

84. And be it further enacted, That, when a married woman shall acknowledge any such deed as aforesaid, the judge, Master in Chancery, or commissioners taking such acknowledgment, shall sign a memorandum, to be endorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,—(a).

(a) The Form of Memorandum is now prescribed by Rule 3 of the Rules made under this Act, and the Conveyancing Act, 1882. See *post*.

The concluding words of sect. 84, and sects. 85 to 88 inclusive, dealt with the subject of certificates, which have been repealed by the Conveyancing Act, 1882, sect. 7 (4) and the schedule thereto.

POWER OF THE COURT OF COMMON PLEAS DEFINED.

Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the Court to make orders touching the examination, memorandums, certificates, affidavits, &c.

89. And be it further enacted, That the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged; and may remove him at pleasure; and the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this Act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said Court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this Act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

COPYHOLDS—EQUITABLE INTERESTS.

A married woman to be separately

90. And be it further enacted, That, in every case in which a husband and wife shall, either in or out of Court, surrender into the

hands of the lord of a manor any lands held by copy of Court-roll, parcel of the manor, and in which she alone, or she and her husband, in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband, in her right, may be entitled in such lands, were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the persons taking the surrender, are hereby declared to be good and valid.

examined on the surrender of an equitable estate in copyholds as if such estate were legal.

THE CONVEYANCING ACT, 1882.

45 & 46 VICT. c. 39.

An Act for further improving the Practice of Conveyancing, and for other purposes. [10th August, 1882.

Married Women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words “two of the perpetual commissioners, or two special commissioners,” the words “one of the perpetual commissioners, or one special commissioner;” and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word “persons” the word “person,” and for the word “commissioners” the words “a commissioner;” and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

Acknowledgment of deeds by married women.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a County Court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and general rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such rule shall make invalid any acknowledgment; and those rules shall, as regards England, be deemed rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict.
c. 59.
44 & 45 Vict.
c. 68.
40 & 41 Vict.
c. 57.

(4.) The enactments described in the schedule to this Act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act, shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

SCHEDULE.

REPEALS.

- | | |
|-----------------------------------|---|
| 3 & 4 Will. 4, c. 74,
in part. | The Fines and Recoveries Act, in part; namely,—
Section eighty-four, from and including the words “and the same judge,” to the end of that section. |
| 4 & 5 Will. 4, c. 92,
in part. | Sections eighty-five to eighty-eight, inclusive.
The Fines and Recoveries (Ireland) Act, in part; namely,—
Section seventy-five, from and including the words “and the same judge,” to the end of that section. |
| 17 & 18 Vict. c. 75. | Sections seventy-six to seventy-nine, inclusive.
An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases. |
| 41 & 42 Vict. c. 23. | The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878. |



RULES UNDER THE ACT FOR THE ABOLITION
OF FINES AND RECOVERIES, AND SECTION 7
OF THE CONVEYANCING ACT, 1882.

1. No person authorized or appointed under the Act 3 & 4 Will. 4, c. 74 (in these rules referred to as the Fines and Recoveries Act) to take the acknowledgments of deeds by married women shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

Acknowledgment not to be taken by interested person.

2. Before a Commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative, and the Commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the Commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the Commissioner shall require the terms of the intended provision to be shortly reduced

Duties of Commissioner in taking acknowledgment.

into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

Form of memorandum.

3. The memorandum to be endorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in sect. 84 of the Fines and Recoveries Act:—

“This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her.”

Declaration by Commissioner as to interest.

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:—

“And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment.”

Authorized forms of signature to memorandum.

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorized to take the acknowledgment:—

(Signed) *A.B.*

A Judge of the High Court of Justice in England,

or A Judge of the County Court of ,

or A perpetual Commissioner for taking acknowledgments of deeds by married women,

or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorized to take the acknowledgment, though not signed in accordance with any of the above forms.

Saving clause.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

Return of special Commission.

7. Every Commission appointing a special Commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be pre-

Index.

pared and kept in the said office, giving the names and addresses of the married women named in all such Commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office. Searches.

8. The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors' Remuneration Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding :— Scale of costs.

Charges under the Act 3 & 4 Will. IV. c. 74 (the Fines and Recoveries Act).

For the indorsements on deeds required by the Fines £ s. d.
and Recoveries Act, to be entered on the Court Rolls of
Manors of the memorandum of production and memo-
randum of entry on Court Rolls, to be signed by the
Lord Steward or Deputy Steward, each indorsement of
memorandum 5s., together 0 10 0

For the entries on the Court Rolls of deeds and the in-
dorsements thereon, at per folio of 72 words 0 0 6

For taking the consent of each protector of settlement
of lands 0 13 4

For taking the surrender by each tenant in tail of lands 0 13 4

For entries of such surrenders or the memorandums
thereof in the Court Rolls, at per folio of 72 words 0 0. 6

9. The following Rules and Orders are hereby repealed, except as to certificates not lodged before the 1st January, 1883, of acknowledgments by married women of deeds executed before the 1st January, 1883, and the affidavits relating thereto :— Repeal.

The General Rules of the Court of Common Pleas, Hil. Term, 1834.

The General Rules of the Court of Common Pleas, Trin. Term, 1834.

The General Order of the Court of Common Pleas, dated the 24th November, 1862.

The General Order of the Court of Common Pleas, dated the 13th January, 1863.

10. These Rules shall take effect from and after the 31st December, 1882. Commence-
ment.



ORDER AS TO COURT FEES.

The following order as to Court Fees came into operation on the 1st January, 1883:—

1. The following portion of the schedule to the order as to Court Fees made on the 28th October, 1875, is hereby repealed, that is to say:—

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On taking acknowledgment of a deed by a married woman.....	1	0	0	6	0	0

And instead thereof the following fees shall henceforth be chargeable in respect of the matters hereinafter mentioned (namely):

Fees under the Act 3 & 4 Will. IV. c. 74 (the Fines and Recoveries Act).

For taking the acknowledgment of a married woman by a Judge of the High Court of Justice	£	s.	d.
	1	0	0
To a perpetual Commissioner for taking the acknowledgment of a married woman when not required to go further than a mile from his residence	0	13	4
To a perpetual Commissioner when required to go more than one mile, but not more than three miles, besides his reasonable travelling expenses.....	1	1	0
To a perpetual Commissioner where the distance exceeds three miles, besides his reasonable travelling expenses	2	2	0
Where more than one married woman at the same time acknowledges the same deed respecting the same property, these fees are to be taken for the first acknowledgment only, and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.....			
To the Clerk of the Peace or his deputy for every search	0	1	0
To the same for every copy of a list of Commissioners, provided such list shall not exceed the number of 100 names	0	5	0
To the same for every further complete number of 50 names, an additional.....	0	2	6
For every official copy of a list of Commissioners, provided such list shall not exceed the number of 100 names ..	0	5	0
For every further complete number of 50 names, an additional.....	0	2	6

	£	s.	d.
For preparing every special Commission	1	0	0
For examining the certificate and affidavit, and filing, and indexing the same.....	0	5	0
Upon the return of a special Commission to the Central Office	0	5	0
For every search in the registry of certificates of acknow- ments of deeds by married women.....	0	1	0
For enrolling recognizances, deeds, and other instruments per folio of 72 words, including the certificate of enrol- ment endorsed on the instrument, but not including maps, plans, and drawings, which are to be charged at their actual cost	0	1	0
For endorsing a certificate of enrolment on a duplicate of any enrolled instrument, for each folio of the instrument if it does not exceed 24 folios	0	0	6
For the like certificate if the instrument exceeds 24 folios	0	12	0
For office copies of enrolled instruments, per folio of 72 words	0	0	6
For examining copies of enrolled instruments and marking them as office copies, per folio of 72 words	0	0	2

20 & 21 VICT. c. 57.

An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate. [25th August, 1857.]

1. After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st day of December, 1857, (except such a settlement as after mentioned,) and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed:

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.

provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument by which she shall be restrained from alienating or affecting the same.

Deeds to be acknowledged by married women in the manner required by 3 & 4 Will. IV. c. 74, for disposing of interests in or powers over land in England or Wales.

In Ireland as by 4 & 5 Will. IV. c. 92.

2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this Act shall be acknowledged by her, and be otherwise perfected, in the manner in and by the Act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of this Act shall be acknowledged by her, and be otherwise perfected in the manner in and by the Act passed in the fourth and fifth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries and the Substitution of more simple Modes of Assurance in Ireland," prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land: and all and singular the clauses and provisions in the said Acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Acts mentioned, shall extend and be applicable to such interests in personal estate and to such powers as may be disposed of, released or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests in or powers over land.

The powers of disposition given by this Act not to interfere with any other powers.

3. Provided always, that the powers of disposition given to a married woman by this Act shall not interfere with any power which, independently of this Act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

4. Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage.

5. This Act shall not extend to Scotland.

THE DIVORCE AND MATRIMONIAL CAUSES ACT.

20 & 21 VICT. c. 85.

An Act to amend the Law relating to Divorce and Matrimonial Causes in England.

[28th August, 1857.]

21. A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the Court for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or Court, if satisfied of the fact of such desertion and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole: provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof: provided also, that if the husband or any creditor or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respect with regard to property and contracts, and suing and being sued as she would be under this Act if she obtained a decree of judicial separation.

Wife deserted by her husband may apply to a police magistrate or justices in petty sessions for protection.

25. In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die

In case of judicial separation the wife to be considered a feme sole with respect to property she may acquire, &c.,

intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate.

also for purposes of contract and suing.

26. In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her or for any costs she may incur as plaintiff or defendant; provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: provided also, that nothing shall prevent the wife from joining at any time during such separation, in the exercise of any joint power given to herself and her husband.



THE DIVORCE AND MATRIMONIAL CAUSES AMENDMENT ACT.

21 & 22 VICT. c. 108.

An Act to amend the Act of the twentieth and twenty-first Victoria, chapter eighty-five. [2nd August, 1858.]

Provisions respecting property of wife to extend to property vested in her as executrix, &c.

7. The provisions contained in this Act and in the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

Order for protection of earnings, &c. of wife to be deemed valid.

8. In every case in which a wife shall under this Act or under the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights

or remedies which any person would have had, in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts or acts of the wife incurred, entered into, or done between the times of the making such order or decree and of the discharge, variation or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree.

THE SETTLED LAND ACT, 1882.

45 & 46 VICT. C. 38.

An Act for facilitating Sales, Leases and other Dispositions of Settled Land, and for promoting the execution of Improvements thereon. [10th August, 1882.]

I.—PRELIMINARY.

- 1.—(1.) This Act may be cited as the Settled Land Act, 1882. Short title;
- (2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act. commencement;
- (3.) This Act does not extend to Scotland. extent.
- 61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman. Married woman, how to be affected.
- (2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this Act.
- (3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.
- (4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.
- (5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.
- (6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

THE MATRIMONIAL CAUSES ACT, 1884.

47 & 48 VICT. c. 68.

An Act to amend the Matrimonial Causes Acts.

[14th August, 1884.]

WHEREAS it is expedient to amend the law as to the restitution of conjugal rights in England:

Short title.

1. This Act may be cited as the Matrimonial Causes Act, 1884.

Periodical payments in lieu of attachment.

2. From and after the passing of this Act a decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the Court may, at the time of making such decree, or at any time afterwards, order that in the event of such decree not being complied with within any time in that behalf limited by the Court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation. The Court may, if it shall think fit, order that the husband shall, to the satisfaction of the Court, secure to the wife such periodical payment, and for that purpose may refer it to any one of the conveyancing counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties.

Settlement of wife's property.

3. Where the application for restitution of conjugal rights is by the husband, if it shall be made to appear to the Court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the Court may, if it shall think fit, order a settlement to be made to the satisfaction of the Court of such property, or any part thereof, for the benefit of the petitioner and of the children of the marriage, or either or any of them, or may order such part as the Court may think reasonable of such profits of trade or earnings to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them.

Power to vary orders.

4. The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same order wholly or in part, as the Court may think just.

Non-compliance with decree deemed to be desertion.

5. If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights; and when any husband who has been guilty of desertion by failure on his part to comply with a decree for restitution of conjugal rights has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree nisi for the dissolution of the marriage on the grounds of adultery coupled with desertion. Such decree nisi shall not be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the Court shall fix a shorter time.

Custody, &c. of children.

6. The Court may, at any time before final decree on any application for restitution of conjugal rights, or after final decree if the respondent shall fail to comply therewith, upon application for that purpose, make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children of the petitioner and respondent as might have been made by interim orders during the pendency of a trial for judicial separation between the same parties.

Act to apply to England only.

7. This Act shall not extend to Scotland or Ireland.

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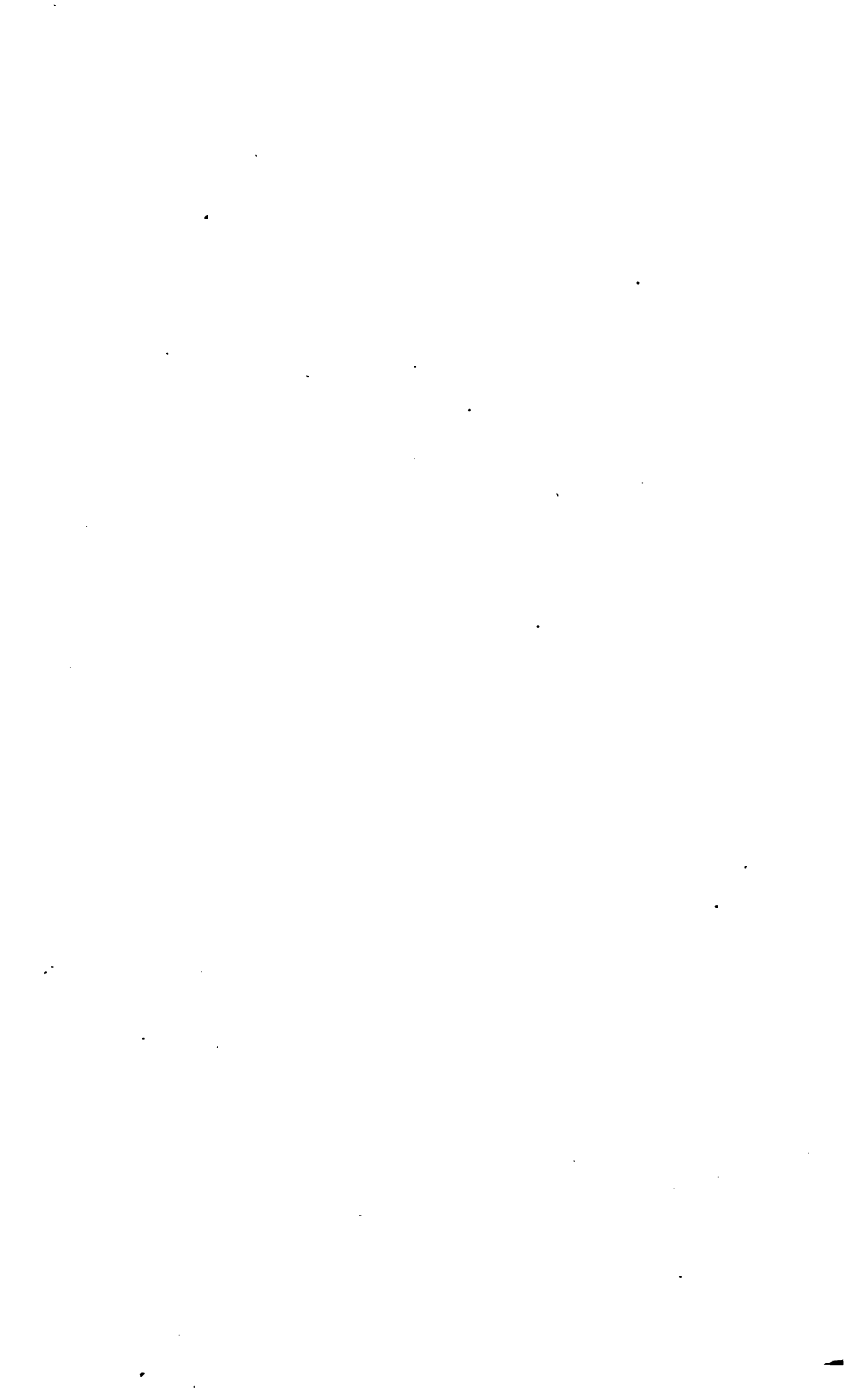
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